No. 82-5773

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

IN THE MATTER OF	)
	)
CONNIE MARIE MOORE and	)
	)
DONNIE LEE MOORE,	)
	)
Minors.	)
	)
Lillie Ruth Moore,	)
	)
Appellant,	)
	)
vs.	)
	)
Guilford County Department	)
	)
of Social Services,	)
	)
Appellee.	)

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ON APPEAL FROM THE SUPREME COURT OF NORTH CAROLINA

JURISDICTIONAL STATEMENT

Judith G. Behar
437 West Friendly Avenue
Greensboro, North Carolina 27401
Telephone: (919) 373-8465

Counsel for Appellant

QUESTIONS PRESENTED

I. Whether the termination of appellant's parental rights pursuant to North Carolina General Statutes §7A-289.32 denied her due process of law because said statute is unconstitutionally vague and the statute's requiring appellant to show a substantial change in the conditions that led to her children's removal for neglect impermissibly shifted the burden of proof from the Guilford County Department of Social Services (petitioner below) to the appellant (respondent below).

II. Whether the termination of appellant's parental rights in the absence of the annual judicial review now required by North Carolina General Statutes §7A-657 violated appellant's right to due process.

PARTIES TO THE PROCEEDING BELOW

Appellant Lillie Ruth Moore was appellant below. Appellee in the proceeding was the Guilford County Department of Social Services. M. Douglas Berry was guardian ad litem for the children.

28 U.S.C. §2403(b) may be applicable.

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TABLE OF AUTHORITIES

OPINIONS BELOW

The opinion of the North Carolina Supreme Court is published unofficially at 293 S.E. 2d 127. The opinions of the North Carolina Court of Appeals and the Guilford County District Court are unpublished. All three opinions are reproduced in the Appendix.

JURISDICTION

The judgment of the North Carolina Supreme Court upholding the termination of the appellant's parental rights, from which appellant appeals, was entered on July 13, 1982. A petition for rehearing was denied on August 25, 1982. This appeal is being filed within 90 days of the date of the denial of rehearing.

The jurisdiction of this Court is invoked under Section 1257 of Title 28, United States Code.

Cases believed to sustain jurisdiction of this Court include Baggett v. Bullitt, 377 U.S. 360, 84 S. Ct. 1316, 12 L. Ed. 2d 377 (1964) and Santosky v. Kramer, _____U.S. _____, 102 S. Ct. _____, 71 L. Ed. 2d 599 (1982).

STATUTORY PROVISIONS

United States Constitution, Amendment XIV, §1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

North Carolina General Statutes, §7A-289.32:

The court may terminate the parental rights upon a finding of one or more of the following:

(3) The parent has willfully left the child in foster care for more than two consecutive years without showing to the satisfaction of the court that substantial progress has been made within two years in correcting those conditions

which led to the removal of the child for neglect, or without showing positive response within two years to the diligent efforts of a county department of social services, a child-caring institution or licensed child-placing agency to encourage the parent to strengthen the parental relationship to the child or to make and follow through with constructive planning for the future of the child.

(4) The child has been placed in the custody of a county department of social services, a licensed child-placing agency, or a child-caring institution, and the parent, for a continuous period of six months next preceding the filing of the petition, has failed to pay a reasonable portion of the cost of care for the child.

North Carolina General Statutes §7A-657:

In any case where the judge removes custody from a parent or person standing in loco parentis because of dependency, neglect or abuse, the juvenile shall not be returned to the parent or person standing in loco parentis unless the judge finds sufficient facts to show that the juvenile will receive proper care and supervision.

In any case where custody is removed from a parent, the judge shall conduct a review within six months of the date the order was entered, and shall conduct subsequent reviews at least every year thereafter. The Director of Social Services shall make timely requests to the clerk to calendar the case at a session of court scheduled for the hearing of juvenile matters within six months of the date the order was entered. The Director shall make timely requests for calendaring of the yearly reviews thereafter. The Clerk shall give 15 days' notice of the review to the parent or the person standing in loco parentis, the juvenile if 12 years of age or more, the guardian, foster-parent, custodian or agency with custody, the guardian ad litem, and any other person the court may specify, indicating the court's

impending review.

The court shall consider information from the Department of Social Services; the juvenile court counselor, the custodian, guardian, the parent or the person standing in loco parentis, the foster-parent, the guardian ad litem; and any public or private agency which will aid in its review.

In each case the court shall consider the following criteria:

(1) Services which have been offered to reunite the family;

(2) Where the juvenile's return home is unlikely, the efforts which have been made to evaluate or plan for other methods of care;

(3) Goals of the foster care placement and the appropriateness of the foster care plan;

(4) A new foster care plan, if continuation of care is sought, that addresses the role the current foster parent will play in the planning for the juvenile;

(5) Reports on the placements the juvenile has had and any services offered to the juvenile and the parent;

(6) When and if termination of parental rights should be considered;

(7) Any other criteria the court deems necessary.

The judge, after making findings of fact, shall enter an order continuing the placement under review or providing for a different placement as is deemed to be in the best interest of the juvenile. If at any time custody is restored to a parent, the court shall be relieved of the duty to conduct periodic judicial reviews of the placement.

STATEMENT OF CASE

This action began in the District Court of Guilford County, North Carolina. Appellee Guilford County DEpartment of Social Services (hereafter DSS) sought the termination of appellant Lillie Ruth Moore's parental rights, pursuant to N.C.G.S. §7A-289.32 in a petition filed in January, 1980.

Lillie Ruth Moore, the appellant-respondent, is the mother of Connie Marie Moore and Donnie Lee Moore, born July 27, 1968. In December, 1973, Mrs. Moore signed a dependency petition requesting that the Guilford County Department of Social Services take custody of the twins because their father was in jail and she was about to enter L. Richardson Hospital for psychiatric treatment. While she was hospitalized and immediately after, employees of the Department of Social Services counseled with her about leaving her husband, arranged for her to receive Supplemental Security Income benefits, and helped her locate an apartment. However, the Moores reconciled in January, 1974; in February, the Court ordered the children returned to them. Both before and after the children came back, the social worker stressed the importance of the family's not living with relatives, of separate rooms for the children, and of family stability.

After the return of the children, the Moores continued to have contact with the Department of Social Services. At Mrs. Moore's request, a social worker arranged for the twins to have their pre-school innoculations and be enrolled in first grade. When Connie began school, she was reported as being disruptive in class, using inappropriate language, hitting other children, and acting out sexual intercourse. She complained of vaginal pain. Her parents did not respond to attempts by school personnel to confer with them. On

November 15, 1974, the principal went to the Moores' home and took the Moores to the school for a conference. A social worker took Mrs. Moore and the children to a health clinic, where Connie was treated for a vaginal inflammation. That day, the Department of Social Services filed a petition alleging that both children were neglected.

At the hearing in December, custody of the children was placed with the Department of Social Services, with Donnie to remain in the home under DSS supervision. Although Donnie was reported as sleeping a lot when he began school, there were no reports of disruptive behavior by him or of specific instances of neglect.

When Mr. Moore evinced hostility to the social worker then on the case, another social worker, Richard Gainer, took over, on April 1, 1975. Mr. Gainer familiarized himself with the Moores' records with DSS prior to his first visit to the family, a few days before a scheduled court hearing concerning Donnie's custody. When Mr. Gainer arrived for his first visit, he discovered that the Moores were facing eviction and Mr. Moore was in hiding because he expected to be arrested for failing to comply with a court order to pay a sum of money. Mr. Moore, according to Mr. Gainer, was quite hostile and was drinking heavily around this time.

In April, 1975, Donnie was placed in a foster home. From April, 1975, to February, 1976, Donnie was in four foster homes. From February 20, 1976 to July 24, 1979, he was in one foster home. The foster parents in the latter abruptly requested his removal when they began to have serious marital problems. From July, 1979, to September, 1980, he was in two foster homes. All together, he had been in six foster homes at the time of the termination hearing.

From December, 1974, to the time of the hearing, Connie had been in either seven or nine foster homes, in North Carolina Memorial Hospital for psychiatric treatment and in Thompson Children's Home. Between May, 1980, when she left Thompson, and the termination hearing in September, she had been in two homes.

After the children were removed, Mr. and Mrs. Moore continued to have economic and marital difficulties. They moved frequently and applied to DSS for help in finding housing and money. In December, 1975, they were in court on their Motion to get back their children. The Court found them "still unfit" and dismissed their Motion.

Mrs. Moore did not visit her children from July, 1976, to July, 1979. The social worker, Mr. Gainer, had some contact with her in June and August of 1977, but did not try to involve her in Connie's therapy, then in process. In September, 1978, Mr. Moore telephoned Mr. Gainer to arrange a visit with the children, with his fiancee present. Mr. Gainer would not allow a visit with the fiancee, and Mr. Moore did not visit. In May, 1979, Mrs. Moore telephoned, indicating that she was living in the mountains, expected to get a divorce soon, and wanted to see her children, but had no way of getting to Greensboro.

In July, 1979, Mrs. Moore visited with Connie at the office of DSS in Greensboro. She had obtained a ride to Greensboro with a relative. Since Donnie had just been moved from his foster home of three years, Mr. Gainer thought it wise that he not see his mother at that time and scheduled an appointment for Mrs. Moore some time later. Mrs. Moore had no way to get to Greensboro from the mountains for that visit and did not keep the appointment.

When Mrs. Moore received the termination petition in

February, 1980, she hired a cab to drive her to Winston-Salem where she could get a bus to Greensboro. She stayed with friends until she found a place in the country where she could have a garden and that would be suitable for the children. She enrolled at Guilford Technical Institute to learn to read and do basic arithmetic. She did not apply to DSS for financial or other aid.

From the time Mr. Gainer became the Moore family's social worker, the Department of Social Services took no affirmative steps to specifically strengthen Mrs. Moore's ties to her children. Visits with the children were limited to once a month for an hour to an hour and a half at DSS offices. The Department had decided prior to 1979 that it would be better for the children not to have contact with their parents; however, the Department did not actively discourage parental ties, but merely failed to encourage them.

Pursuant to its decision to seek termination and to try to place Connie and Donnie for adoption, the Department of Social Services filed a termination petition on January 17, 1980. Mr. Moore voluntarily released the children for adoption. Mrs. Moore filed an answer to the Petition and a hearing was held on July 15, 1980, to determine the issues. On September 24 and 25, 1980, a hearing on the previously determined issues was held, resulting in an Order to terminate Mrs. Moore's parental rights. At the latter hearing, the question whether N.C.G.S. §7A-289.32 was unconstitutionally vague was raised by Mrs. Moore's motion to dismiss for failure to state a claim for relief. The motion was denied.

The question of whether or not a denial of due process resulted from the failure to provide annual judicial review (now mandated by N.C.G.S. §7A-657) after custody

had been removed for neglect was raised during cross-examination of the social worker and in closing argument. The absence of annual judicial review seemed to be ignored by the trial court.

Both questions were preserved on appeal to the North Carolina Court of Appeals, which dismissed on grounds that the appeal was not timely filed, and on review by the North Carolina Supreme Court, a majority holding that N.C.G.S. §7A-289.32(2) had to be reasonably limited in time and was not so limited in the Moore case, but upholding the remainder of the statute without limiting it, and failing to address the question of the relevance of N.C.G.S. §7A-657.

WHY PLENARY CONSIDERATION IS REQUIRED

The questions presented by this case concern the fundamental integrity of the family, the obligations a government agency has towards the family when it intervenes on behalf of the children, and the circumstances under which that agency may act to destroy the family bonds.

Neither the law nor the Department of Social Services informed the Appellant of what conduct was required of her with sufficient specificity for her to conform her behavior to the state's expectations. Yet her parental rights were terminated because she failed to show "to the satisfaction of the court that substantial progress had been made within two years in correcting those conditions which led to the removal of the child[ren] for neglect." N.C.G.S. §7A-289.32(3). DSS issued no clear-cut, specific directives to the parents as to what they had to do to have the custody of their children restored to them. A statute dealing with so significant a loss as the termination of parental rights should give notice of what is expected to the same degree of adequacy as a criminal statute. Smith v. Goguen, 415 U.S. 566, 94 S. Ct. 1242, 39 L. Ed. 2d 605 (1974). Unless the court sets out what

will constitute "substantial progress" sufficient to satisfy the court, at a proceeding prior to a termination proceeding, a parent cannot be held to have been informed of what is required by the court (apparently, N.C.G.S. §7A-657, mandating annual review, is intended to address this difficulty). In the present case, neither DSS nor the court specifically told Mrs. Moore what she would have to do to come within the meaning of "substantial progress" to the satisfaction of the Court.

Parents have both a liberty and a privacy interest in the integrity of the family. Smith v. Organization of Foster Families, 431 U.S. 816, 97 S. Ct. 2094, 53 L.Ed. 2d 14 (1977), Prince v. Massachusetts, 321 U.S. 158, 64 S. Ct. 438, 88 L. Ed. 645 (1944). When the state intervenes to deprive parents of those interests by permanently terminating the most basic of human relationships, because erroneous deprivation will have such fundamental and irrevocable effects on both the parents and the children, the state must provide procedural safeguards of the highest order. Smith v. Organization of Foster Families, supra. The state should have the burden of proof at every stage of the proceedings to show that unsatisfactory conditions continue to exist and that a termination of parental rights is in the best interest of the children. The state should be required to show that it has provided or can provide care and nurture so superior to that of the parents that the best interests of the child require termination. In the present case, the evidence presented by DSS showed that the children had lived in a large number of foster homes: Connie in a total of nine and Donnie in seven. Although they were twins, except for their first placement, they lived in separate homes. Although their mother moved frequently, the children were not uprooted as a result of her moves. The children's moves, their separation from one another, and their changes of family were necessitated by their being in DSS custody and the way in which the system of

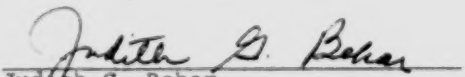
foster care often functions.

CONCLUSION

The Department of Social Services should have had the burden of proving by clear, cogent and convincing evidence, that Mrs. Moore had been specifically informed of what was expected of her in order that her parental rights not be terminated, that she had failed to meet those specific expectations, that she had failed to pay a reasonable portion of the cost of child-care, and that DSS had provided or with reasonable certainty could provide a stable home for the Moore children suprior to the home their mother could provide and it was in the children's best interests that their mother's parental rights be terminated. By failing to require that proof and by failing to give adequate notice of the conduct required, in light of the interests at risk, the termination statutes deny the appellant important procedural safeguards and so violate her Fourteenth Amendment right to due process.

For these reasons, the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

Respectfully submitted,



Judith G. Behar
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IN THE SUPREME COURT OF NORTH CAROLINA

IN THE MATTER OF	)	
	)	
CONNIE MARIE MOORE and	)	No. 5PA 82 - Guilford
	)	
DONNIE LEE MOORE,	)	
	)	
Minors.	)	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Pursuant to Rule 10.1 of the United States Supreme Court Rules, notice is hereby given that Lillie Ruth Moore, Respondent-appellant in the above action, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of North Carolina, entered August 25, 1982, denying rehearing on the Judgment terminating said Lillie Ruth Moore's parental rights, which Judgment was entered on July 13, 1982.

This appeal is taken pursuant to 28 U.S.C. §1257.

This the 28th day of October, 1982.

Judith G. Behar

Judith G. Behar
Attorney for Lillie Ruth Moore, Appellant
437 West Friendly Avenue
Greensboro, North Carolina 27401
Telephone: (919) 373-8465

CERTIFICATE OF SERVICE

I, Judith G. Behar, attorney for Appellant in the above-entitled action, do hereby certify that I have served a copy of the foregoing NOTICE OF APPEAL on Ms. Margaret Dudley, attorney for Petitioner/appellee, and Mr. M. Douglas Berry, guardian ad litem, by depositing a copy thereof, postage prepaid, in the United States Mail, addressed to:

Ms. Margaret Dudley
Guilford County Attorney
Governmental Plaza
Greensboro, North Carolina 27401

Mr. M. Douglas Berry
Southeastern Building
Greensboro, North Carolina 27401

This the 28th day of October, 198..

Judith G. Behar

SUPREME COURT OF NORTH CAROLINA
J. GREGORY WALLACE, CLERK
AREA CODE 919 733-3723 P. O. BOX 2170
RALEIGH, NORTH CAROLINA 27602

MRS. PEGGY N. BYRD
CHIEF DEPUTY CLERK
MISS TERRY E. WATKINS
MRS. SHAULA A. PENNINGTON
DEPUTY CLERKS

August 30, 1982

Judith G. Behar
Attorney at Law
437 West Friendly Avenue
Greensboro, NC 27401

Re: In the Matter of Moore
No. 5PA82

Dear Ms. Behar:

Lillie Ruth Moore's Petition to Rehear has been filed and the following order entered:

"Denied by order of the Court in Conference this the 25th day of August 1982.

s/ Martin, J.
For the Court"

Very truly yours,

J. Gregory Wallace
Clerk of the Supreme Court

JGW/tjh

cc: Margaret Dudley, Attorney at Law
M. Douglas Berry, Attorney at Law

IN THE SUPREME COURT OF NORTH CAROLINA

IN THE MATTER OF	)	
	)	
CONNIE MARIE MOORE and	)	No. 5PA82 - Guilford
	)	
DONNIE LEE MOORE,	)	
Minors	)	

On certiorari to review order of Yeattes, Judge, entered 25 November 1980 in District Court, Guilford County.

This cause consists of two proceedings instituted in the district court in January 1980 to terminate the parental rights of Bruce Kelly Moore and Lillie Ruth Moore in two of their minor children, twins Connie and Donnie Moore. It appears that from the outset the two proceedings have been treated as one and they are so treated here.

On 7 February 1980 the father, Bruce Moore, executed a document releasing the children for adoption. Mrs. Moore timely filed an answer in which she opposed the relief sought by petitioner, the Guilford County Department of Social Services.[1] She also moved for a trial by jury and moved pursuant to G.S. 1A-1, Rule 12(b), that the proceedings be dismissed for failure to state a claim for relief. These motions were denied.

Following a lengthy hearing beginning on 24 September 1980 the court made findings of fact to which there is no exception. The facts, as found by the court and established by the record, are summarized in pertinent part as follows:

---

[1]Hereinafter the Guilford County Department of Social Services may be referred to as petitioner or DSS and Mrs. Moore may be referred to as respondent.

Connie and Donnie Moore were born on 27 July 1968. In December 1973 Mrs. Moore signed a dependency petition requesting that DSS take custody of the twins because their father was in jail and she was about to enter L. Richardson Hospital for psychiatric treatment. While she was hospitalized and immediately thereafter, employees of DSS counseled with her about leaving her husband, arranged for her to receive Supplemental Security Income benefits, and helped her locate an apartment.

The Moores reconciled in January 1974 and in February thereafter the court ordered the children returned to them. Both before and after the children were returned to their parents, a social worker stressed the importance of the family's not living with relatives, having separate rooms for the children, and family stability. Following the return of the children, the Moores continued to have contact with the DSS. At Mrs. Moore's request, a social worker arranged for the twins to have their preschool inoculations and to be enrolled in first grade.

When Connie began school she was reported as being disruptive in class, using vulgar language, hitting other children, and acting out sexual intercourse. She complained of vaginal pain. After her parents did not respond to attempts by school personnel to confer with them, on 15 November 1974 the principal went to the Moores' home and took them to the school for a conference. A social worker took Mrs. Moore and the children to a health clinic where Connie was treated for a vaginal inflammation. On the same day the DSS filed a petition alleging that both children were neglected.

A hearing was held pursuant to the petition in December and the parents were represented by counsel. Custody of the children was placed with the DSS, with Donnie to remain in the home under DSS supervision. Although Donnie was reported as sleeping a lot when he began school, there were no reports of disruptive behavior by him or of specific instances of neglect.

Mr. Moore's hostile behavior toward the female social worker then on the case caused DSS to assign another social worker, Richard Gainer, to the case. Mr. Gainer took over on 1 April 1975. After familiarizing himself with the Moore's records with DSS, Mr. Gainer went to the home for his first visit. Upon arrival he discovered that the Moores were facing eviction and that Mr. Moore was in hiding because he expected to be arrested for failing to comply with a court order to pay a sum of money. Mr. Moore was quite hostile and was drinking heavily at that time.

In April of 1975 Donnie was placed in a foster home. From that time until February of 1976 he lived in four foster homes. From 20 February 1976 to 24 July 1979 he lived in one foster home. The foster parents in this last home requested Donnie's removal rather abruptly when they began having serious marital problems. Between July of 1979 and September of 1980 he was in two foster homes. Altogether, he had been in six foster homes at the time of the termination hearing.

Between December of 1974 and the termination hearing in September 1980 Connie had been in either seven or nine foster homes. During this period Connie was also placed in North Carolina

Memorial Hospital for psychiatric treatment and in Thompson Children's Home. Between May of 1980, when she left Thompson, and the termination hearing in September, she had been in two homes.

Mr. and Mrs. Moore continued to have economic and marital difficulties after the children were removed from their home. They moved frequently and applied to DSS for help in finding housing and for money. In December 1975 they filed a motion with the court seeking to have custody of the children returned to them. The court found that they were "still unfit" to have the children and dismissed the motion.

Since 1975 the Moores have had 16 different addresses in or near seven different cities or towns. Mrs. Moore left her husband in 1977 and after a two year separation, obtained a divorce on 8 October 1979.

Between December 1974 and September 1980 Mrs. Moore paid 11 visits to Connie and nine visits to Donnie. For a period of three years, July 1976 to July 1979, there were no visits nor any other communication with the children.

Mr. Gainer had some contact with Mrs. Moore in June and August of 1977 but did not try to involve her in Connie's therapy which was then in process. In September 1978 Mr. Moore telephoned Mr. Gainer and attempted to arrange a visit with the children, with his fiance present. Mr. Gainer would not allow a visit in the presence of the fiance and Mr. Moore did not visit. In May 1979 Mrs. Moore telephoned DSS indicating that she was living in the mountains, expected to get a divorce soon thereafter, wanted to see her children but had no way of getting to Greensboro.

In July of 1979 Mrs. Moore visited with Connie at the DSS office in Greensboro. Since Donnie had just been moved from his foster home of three years, Mr. Gainer thought it wise that he not see his mother at that time and scheduled an appointment for Mrs. Moore sometime later. Mrs. Moore had no way to get to Greensboro from the mountains for that visit and did not keep the appointment.

Mrs. Moore did not visit with either of the children again until after she received notice of the termination petition in February 1980. Mrs. Moore never gave either of the children a Christmas, Easter or birthday present while they were in foster care until after the termination petition was filed.

Meanwhile, DSS reached a decision to seek termination of the Moore's parental rights and to try to place the twins for adoption. The termination petition was filed on 17 January 1980. As stated above, Mr. Moore voluntarily released the children for adoption.

When Mrs. Moore received notice of the termination petition in February 1980, she employed a cab to drive her to Winston-Salem where she could get a bus to Greensboro. She lived with friends until she found a place in the country where she could have a garden and which she thought would be suitable for the children. She resumed counseling at Guilford County Mental Health Center and kept her appointments. She had some visits with the children. She also enrolled at Guilford Technical Institute for purpose of learning to read and doing basic arithmetic. She did not apply to DSS for financial or other aid.

Approximately six months after the termination petition was

filed, on 2 July 1980, Mrs. Moore asked the social worker what amount of money she should pay for the children's support. Fifteen dollars per week was suggested although Mrs. Moore offered to pay $40 per week. Nothing was ever paid. DSS paid Thompson Children's Home $28,883.96 for Connie's care. Foster parents are paid $142.50 per month and the children receive Medicaid. DSS furnishes their clothing. Mrs. Moore testified at the termination hearing that she could not afford to pay anything for the children's support because her automobile insurance premium was unexpectedly high. Mrs. Moore owns a 1971 Cadillac, and another car, plus a pickup truck which she rents out for $50 per week. She also receives $218 per month in social security benefits. Her automobile insurance is $800 per year.

Mrs. Moore dropped out of the program at Guilford Technical Institute because she could not get to school on account of "gas problems." Further, although in February 1980 Mrs. Moore went to DSS and stated that she was then in a position to take care of the children and that she was going to move in with a brother in Ashe County who had agreed to take both of the children, she later wondered if the brother was willing to have children with discipline problems and did not know if she could handle Connie's problems.

Donnie has been provided with counseling sessions with a psychiatrist due to the fact that he began "acting out" and being defiant. His behavior has improved considerably since 31 March 1980. Donnie does not want to return to his mother. His school performance has improved in his current foster placement and his work is much more stabilized and acceptable.

Although much improved, Connie still has some behavior problems and is slow academically. She is in a special education class.

Based on its findings of fact the trial court concluded as a matter of law that (1) Mrs. Moore has neglected the children; (2) she has wilfully left the children in foster care for more than two years and substantial progress has not been made to the court's satisfaction in correcting the conditions which lead to the removal of the children; and (3) the children have been placed in the custody of the DSS and Mrs. Moore has failed for a period of six months to pay a reasonable portion of the costs of their care. The court ordered that the parental rights of Mrs. Moore be terminated and that the children remain in the custody of the DSS until such time as they can be placed for adoption.

Mrs. Moore appealed to the Court of Appeals and the record on appeal was duly served and filed in that court. Briefs were filed and the cause was heard on 1 September 1981. The Court of Appeals concluded that because the notice of appeal had not been filed within 10 days after entry of Judge Yeattes' order as G.S. 1-279(c) and Appellate Rule 3(c) require, the appeal must be dismissed for lack of appellate jurisdiction.

Mrs. Moore petitioned this court for discretionary review under G.S. 7A-31. This court treated the petition as one for a writ of certiorari to review the order of the trial court and allowed the petition on 12 January 1982.

Judith G. Behar for appellant.

Margaret A. Dudley, Deputy County Attorney, for Guilford

County Department of Social Services-appellee.

BRITT, Justice.

I.

The Court of Appeals properly dismissed respondent's appeal because of her failure to give timely notice of appeal.

The record on appeal reveals that while Judge Yeattes did not enter his formal written order until 25 November 1980, he announced his decision in open court on 25 September 1980 immediately after the hearing. G.S. 1-279(c) and Appellate Rule 3(c) provide that if oral notice of appeal is not given at trial, notice of appeal must be filed and served within 10 days after "entry" of the order or judgment. G.S. 1A-1, Rule 58, provides that "where judgment is rendered in open court, the clerk shall make a notation in his minutes as the judge may direct and such notation shall constitute the entry of judgment for the purposes of these rules. The judge shall approve the form of the judgment and direct its prompt preparation and filing."

It appears that respondent did not give oral notice of appeal at trial but filed and served her notice of appeal on 8 October 1980, 13 days after the "entry" of the order. Nevertheless, since we have allowed Mrs. Moore's petition for a writ of certiorari and have considered the appeal on its merits, the question of validity of the notice of appeal has become moot.

II.

Respondent contends that the trial court erred in denying her motion to dismiss the petition to terminate her parental rights. She argues that the petition does not state a claim for relief for the reason that the "termination statutes" are unconstitutionally vague and do not provide for due process in light of the interests at stake. We find no merit in this contention.

G.S. 7A-289.32 sets forth six separate grounds upon which a termination of parental rights order can be based. Portions of the statute pertinent to the case at hand are as follows:

> Grounds for terminating parental rights.--The court may terminate the parental rights upon a finding of one or more of the following:
>
> (1) . . .
>
> (2) The parent has abused or neglected the child. The child shall be deemed to be abused or neglected if the court finds the child to be an abused child within the meaning of G.S. 110-117 (1)(a), (b), or (c), or a neglected child within the meaning of G.S. 7A-278(4).
>
> (3) The parent has willfully left the child in foster care for more than two consecutive years without showing to the satisfaction of the court that substantial progress has been made within two years in correcting those conditions which led to the removal of the child for neglect, or without showing positive response within two years to the diligent efforts of a county department of social services, a child-caring institution or licensed child-placing agency to encourage the parent to strenghten the parental relationship to the child or to make and follow through with constructive planning for the future of the child.
>
> (4) The child has been placed in the custody of a county department of social services, a licensed child-placing agency, or a child-caring institution, and the parent, for a continuous period of six months next preceding the filing of the petition, has failed to pay a reasonable portion of the cost of care for the child.
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> * * *

G.S. 7A-278(4) referred to in subsection (2) of the quoted statute was repealed by Chapter 815 of the 1979 Session Laws. The substance of former G.S. 7A-278(4) now appears as G.S. 7A-517(21) [1981 Replacement] as follows:

> (21) Neglected Juvenile.--A juvenile who does not receive proper care, supervision, or discipline from his parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care or other remedial care recognized under State law, or who lives in an environment injurious to his welfare, or who has been placed for care or adoption in violation of law.

This court in In Re Clark, 303 N.C. 592, 281 S.E. 2d 47 (1981), upheld the constitutionality of subsection (4) quoted above. See also In Re Biggers, Two Minor Children, 50 N.C. App. 332, 274 S.E. 2d 236 (1981). We reaffirm our holding in Clark.

On the question of vagueness of a statute, this court in In Re Burrus, 275 N.C. 517, 531, 169 S.E. 2d 879 (1969), aff'd, 403 U.S. 528 (1971), an opinion authored by Justice Huskins, said:

> It is settled law that a statute may be void for vagueness and uncertainty. "A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." 16 Am. Jur. 2d, Constitutional Law § 552; Cramp v. Board of Public Instruction, 368 U.S. 278, 7 L. ed 2d 285; 82 S.Ct. 275; State v. Hales, 256 N.C. 27, 122 S.E. 2d 768. Even so, impossible standards of statutory clarity are not required by the constitution. When the language of a statute provides an adequate warning as to the conduct it condemns and prescribes boundaries sufficiently distinct for judges and juries to interpret and administer it uniformly, constitutional requirements are fully met. United States v. Petrillo, 332 U.S. 1, 91 L. ed 1877, 67 S.Ct. 1538.

275 N.C. at 531.

Further, in the case of In Re Biggers, supra, we find:

> A statute must be examined in the light of the circumstances in each case, and respondent has the burden of showing that the statute provides inadequate warning as to the conduct it governs or is incapable of uniform judicial administration. State v. Covington, 34 N.C. App. 457, 238 S.E. 2d 794, rev. denied, 294 N.C. 184, 241 S.E. 2d 519 (1977).

50 N.C. App. at 340.

Applying the standard set forth in Burrus and Biggers, and cases cited therein, we hold that the provisions of G.S. 7A-289.32(2) and (3), and G.S. 7A-278(4) quoted above are not unconstitutionally vague. People of common intelligence need not guess at their meaning and differ as to their application.

With respect to respondent's due process contention, she argues that while she and her husband were provided counsel when the decision to remove the children for neglect was first made in 1974, "the record does not show that they were represented or advised that they could be represented" when they petitioned the court in 1975 to return the children.

We do not reach the question of whether due process requires that counsel be provided indigents when they petition for a return of children. The presumption is in favor of the correctness of the proceedings in the trial court, London v. London, 271 N.C. 568, 157 S.E. 2d 90 (1967); Gregory v. Lynch, 271 N.C. 198, 155 S.E. 2d 488 (1967), and the burden is on the appellant to show error. Gregory v. Lynch, supra. Respondent has failed to show that she did not have counsel. Furthermore, the record is just as susceptible to interpretation that respondent had counsel as that she did not. Although the court order from the 19 December 1975 hearing did not reflect the presence of counsel for the parents, Richard Gainer

testified that the Moore's attorney had the proceedings continued from the 12th to the 19th (R pp 16a, 50).

III.

Respondent states her next contention as follows: "The trial court erred in denying respondent's motion to dismiss at the close of the state's evidence and at the close of all of the evidence when there was clear, cogent and convincing evidence that respondent had made substantial progress in correcting the conditions that had lead to the children's removal for neglect, that she had not failed to pay a reasonable portion of the cost of their care, that petitioner had not diligently encouraged the respondent to strengthen her parental relationship to the children, and that respondent had not wilfully left her children in foster care for more than two years." Her final contention is that the trial court's conclusions of law are erroneous in that they are not supported by clear, cogent and convincing evidence. We find no merit in these contentions.

G.S. 7A-289.30(e) provides, inter alia , that in an adjudicatory hearing on a petition to terminate parental rights the court shall find the facts and "all findings of fact shall be based on clear, cogent, and convincing evidence." It will be noted that the trial court is authorized to terminate parental rights "upon a finding of one or more" of the six grounds listed in G.S. 7A-289.32.

In the case at hand the trial court based its order terminating respondent's rights on three of the grounds set forth

in the statute, (2), (3) and (4). The court concluded as a matter of law (a) that respondent had neglected the children; (b) that she had wilfully left the children in foster care for more than two years and substantial progress had not been made to the court's satisfaction in correcting the conditions which lead to the removal of the children; and (c) the children had been placed in the custody of the DSS and respondent had failed for a period of six months to pay a reasonable portion of the costs of their care.

If either of the three grounds aforesaid is supported by findings of fact based on clear, cogent and convincing evidence, the order appealed from should be affirmed. We have set forth above a lengthy summary of the findings of fact and other facts established by the record. Since respondent did not except to any of the findings, they are presumed to be correct and supported by evidence. Nationwide Homes of Raleigh, Inc. v. First Citizens Bank & Trust Co., 267 N.C. 528, 148 S.E. 2d 693 (1966); Keeter v. Lake Lure, 264 N.C. 252, 141 S.E. 2d 634 (1965). Nevertheless, we have reviewed the evidence and conclude that the findings are supported by clear, cogent and convincing evidence and the findings support all three of the conclusions of law.

With respect to the first ground upon which the court based its termination order, evidence showing that the children were "neglected" as that term is defined by G.S. 7A-517(21) was overwhelming. In fact, practically all of the evidence tended to show that when the children were in respondent's charge they did not "receive proper care, supervision, or discipline from" their parents, that they were not provided "necessary medical

care", and that they lived "in an environment injurious to" their welfare. The evidence was abundant that after the children were retaken by petitioner, respondent made very little effort to visit or even contact them for approximately three years. In fact, between July 1976 and July 1979 she did not visit them at all, or even send them a Christmas present. It is true that after the termination petition was filed, she began visiting the children and gave them gifts. Certainly the evidence showing neglect of the children was clear, cogent and convincing.

The second ground for the court's termination order was that respondent wilfully left the children in foster care for more than two years and substantial progress was not made to the court's satisfaction in correcting the conditions which led to the removal of the children. As stated above, the evidence is abundant that respondent left the children in foster care for more than four years, and that during three of those years she did not visit or communicate with them or make any serious effort to do so. After the petition to terminate parental rights was filed, she made arrangements to visit the children and manifested some efforts to arrange a place for the children to live with her; however, even then she was not certain that she could take care of the children, particularly Connie. We think the evidence supporting the trial court's second ground for termination was clear, cogent and convincing.

As to the third ground for termination, the undisputed evidence showed that the children were placed in the custody of petitioner in 1975 or 1976, that they continued in the custody of

DSS until the petition was filed on 17 January 1980 (considerably more than 36 months), and that the respondent paid no part of the costs of their care during that period of time. Not only was this ground proven by clear, cogent and convincing evidence, there was no evidence to the contrary.

IV.

The county departments of social services have no greater responsibility than that imposed on them by our statutes relating to neglected children. In the case at hand we are convinced that petitioner has gone the "extra mile" in trying to stabilize respondent's home so that there would be a reasonable chance that a resumption of her parental responsibilities over Connie and Donnie would be successful. When the termination procedure was instituted, the children were 12-1/2 years old and their physical and emotional problems continued to be legion. Donnie had been in six different foster homes and Connie had been in seven or nine in addition to having been in a hospital for psychiatric treatment.

Having concluded that respondent would not be able to establish a stable home for the children, and that the children desperately need more stability in their home lives during the remainder of their minority, petitioner seeks to have respondent's parental rights terminated with the hope that the children might be adopted by people who will provide their needs. Respondent's plea seems to be "give me another chance, it <u>might</u> succeed."

The children are now 14, a very crucial period in their

development to adulthood. The trial court concluded, in effect, that the course pursued by petitioner is in the best interest of the children and we find no reason to disturb that decision.

The decision of the Court of Appeals dismissing the appeal is vacated. The order of the trial court is

Affirmed.[2]

[2]We are advertent to the amendments to G.S. 7A-289 enacted by Chapter 1131 of the 1981 Session Laws (1982 Adjourned Session) ratified 11 June 1982. However, we conclude that said amendments do not relate to the questions presented by this appeal.

Justice Carlton dissenting.

Believing that the majority has cavalierly applied o termination of parental rights statutes to the facts disc by the record before us, as fully discussed below, I dissent. This is a disturbing decision. The majority condones a horrible example of excessive governmental intrusion into the affairs of family. That this poor and pitiful family needs help from the state, there can be no doubt. Such help need not, and ought not, result in extinguishing forever the nourishing biological bond which exists between mother and children.

There are few losses, if any, more grievous than the abrogation of parental rights. No relationship is more precious in this life, nor treasured more highly, than that of parent and child. The law should treat that relationship with no less esteem. Applying the prevailing law in this jurisdiction to the record before us, the majority has failed to do so here. I fear that this decision creates a dangerous precedent for the future.

I.

I strongly disagree with the majority's conclusion that the trial court had clear, cogent and convincing evidence before it, as required by G.S. 7A-289.30(e) (1981), to support its findings and conclusions that Mrs. Moore (1) had neglected her children as contemplated by G.S. 7A-289.32(2) (1981), (2) had willfully left the children in foster care for more than two years and substantial progress had not been made to the court's satisfaction in correcting the conditions which led to the removal of the children as contemplated by G.S. 7A-289.32(3) (1981), and (3) had failed for a

period of six months, while the children were placed in the custody of the DSS, to pay a reasonable portion of the cost of their care as contemplated by G.S. 7A-289.32(4) (1981). I discuss below each of these statutory grounds for termination of parental rights and my reasons for disagreeing that each of them exists.

A.

Turning first to the conclusion that these children were neglected as contemplated by G.S. 7A-289.32(2) (1981), I agree with the majority that we must look to G.S. 7A-517(21) (1981) for a definition of "neglect." The latter statute defines a neglected child as one who does not receive "proper care, supervision, or discipline from his parent, . . . ; or who has been abandoned; or who is not provided necessary medical care or other remedial care recognized under State law, or who lives in an environment injurious to his welfare. . . ." I must also agree with the majority that in the very early years of these children's lives Mrs. Moore did not provide adequate care, supervision, or discipline and that the children lived "in an environment injurious" to their welfare. My reading of the record, however, indicates that this resulted from the abusive conduct of Mr. Moore and not from intentional neglect by Mrs. Moore.

My disagreement with the majority holding concerning this ground for termination of parental rights is with its application to this case. I believe that the plain language of the statute compels the conclusion that when neglect is to be used as a statutory ground for terminating parental rights, the court trying the termination matter must find that neglect on the basis of the

parent's conduct just prior to the filing of the petition to terminate. I do not believe that the statute lends itself to the construction that one trial court's finding of neglect which led to the taking of the child years before can be relied on by the trial court trying the termination matter as a ground for termination. The two proceedings were for very distinct purposes. The former was simply to remove physical custody from the Moores. This proceeding is to eliminate forever Mrs. Moore's rights as a mother. The trial court here must have relied on the prior finding of neglect. Obviously, the trial court here could not find that a mother who had not had custody of her children for several years had neglected them, as neglect is defined by the statute.

In enunciating this statutory ground for terminating parental rights, I cannot imagine that our Legislature envisioned the ground to have unlimited application in terms of time. Here, the record discloses that the action for termination of parental rights was instituted in January of 1980. The last time Mrs. Moore had custody of Connie was in December of 1974. The last time Mrs. Moore had custody of Donnie was in April of 1975. In other words, for five years prior to the institution of this action, Mrs. Moore did not have custody of Connie and, for nearly five years, she did not have custody of Donnie. Clearly, Mrs. Moore could not "neglect" children, as contemplated by the statute, when they were not in her custody. In finding that the evidence was "overwhelming" that the children had been neglected, the majority refers only to evidence concerning the conduct of Mrs. Moore after custody had been granted to the DSS. The majority opinion refers to the mother's failure to visit during the period custody was in the DSS and to her failure to send Christmas

presents. Such evidence, I contend, has absolutely nothing to do with whether Mrs. Moore was neglectful to her children in the statutory context of providing proper care, supervision, discipline or necessary medical care. It most certainly has nothing to do with whether the children, at some point in time, may have lived in an environment injurious to their welfare.

In other words, reliance on this statutory ground for terminating parental rights requires, in my opinion, that the alleged neglect of the parent must have occurred within a reasonable period prior to the filing of the petition to terminate. To interpret the statute otherwise would be patently unjust. For example, a parent who might be neglectful as contemplated by the statute, to a one-year old child resulting from that parent's alcoholism, might well be reformed and be capable of becoming a model parent several years later. In such a case, it would be surely unjust to allow that parent's parental rights to be terminated some four or five years later on the basis of his or her prior conduct. In this example, if the DSS had received custody of the child at the time the parent was neglectful due to his or her alcoholism and had not instituted an action for termination of parental rights due to the resulting neglect within a reasonable time after receiving custody, then I do not believe that this statutory ground should have any application whatsoever to a later proceeding to terminate parental rights. Should the petitioning party, in this example, believe that a parent's rights to parenthood should be terminated at such a late date, some other standard or ground for termination must be found.

So it is here. While there may have been evidence of neglect on the part of Mrs. Moore many years prior to the institution of

of this action, I cannot agree with the majority that there is any evidence, much less clear, cogent and convincing evidence, that Mrs. Moore was neglectful of these children during a reasonable time prior to institution of the action. For that reason, I would hold that this statutory ground was improperly applied by the trial court.

I would also add that any other interpretation of this statutory ground would, in my opinion, present a serious constitutional problem. I do not believe that this statutory ground would survive a constitutional attack for failing to provide due process to a parent unless a reasonable time frame for its application is applied by the courts.

In summary, I would hold that this statutory ground had no application in this action for the reasons stated above and, should the trial court order be allowed to stand, another statutory ground supported by findings and conclusions based on clear, cogent and convincing evidence must be found.

B.

The next ground relied on by the trial court for terminating Mrs. Moore's parental rights was that she had willfully left the children in foster care for more than two years and that substantial progress had not been made to the court's satisfaction in correcting the conditions which led to the removal of the children. G.S. 7A-289.32(3) (1981). Relying primarily on the fact that Mrs. Moore did not visit with her children for some three years while they were in foster care, the majority finds clear, cogent and convincing evidence to support this ground. Again, I believe the majority has

applied an improper time frame to a ground for termination of parental rights. The majority acknowledges that, several months prior to the hearing, Mrs. Moore employed a cab to drive her to Winston-Salem where she could get a bus to Greensboro. There, she lived with friends until she found a place in the country where she could have a garden and which she tnought was suitable for her children. She resumed counselling at Guilford County Mental Health Center and kept her appointments. She also visited with the children. She enrolled at Guilford Technical Institute to learn reading and basic arithmetic. The record also discloses that Mrs. Moore had taken other steps to correct the conditions that led to her children's removal for neglect. Other evidence in the record indicates that Mrs. Moore had taken other steps to improve her situation to properly raise her children. I am unable, therefore, to agree with the majority that no "substantial progress" had been made within two years in correcting the conditions leading to the removal of the children for neglect. Certainly, the evidence to support this ground is not clear, cogent and convincing.

I assume that the majority would answer this argument by noting that most of the progress made by Mrs. Moore which I referred to above occurred after the petition for termination was filed. This raises the question of what two-year period is referred to in G.S. 7A-289.32(3). The statute clearly, in my view, refers to the two years leading up to the time of the hearing. To interpret the statute otherwise would mean that the trial court must ignore evidence of substantial progress made by a parent during the sometimes lengthy period between the filing of the petition and the hearing, a manifest injustice. My view is buttressed by the enactment in 1979 of G.S. 7A-657 (1981). That statute now requires trial

courts to review custodial removal orders within six months from entry and annually thereafter. This legislation clearly contemplates that progress may be made by a parent during the period immediately preceding a hearing.

The facts of this case highlight the necessity for interpreting the statute as I have above. Nowhere in this record do I find that the DSS presented Mrs. Moore with a plan of care for her children. This mother was given no specific directives as to what would be required of her to have custody of her children restored. I find no evidence that the DSS ever explained to Mrs. Moore that she might lose all her parental rights forever. The first she knew of this possibility, I assume, was when the petition was served on her. Surely, fundamental fairness and due process require that she be able from that time to the time of the hearing to show her ability to improve her situation for motherhood.

I also disagree with the majority that Mrs. Moore "willfully" left the children in foster care for more than two consecutive years. I consider the word "willfully" an extremely important one as used in this ground for termination of parental rights. This Court has had numerous occasions to consider the meaning of willfulness as used in statutes such as this. The word "imports knowledge and a stubborn resistance." Mauney v. Mauney, 268 N.C. 254, 150 S.E. 2d 391 (1966). One does not willfully fail to do something which it is not within his power to do. Lamm v. Lamm, 229 N.C. 248, 49 S.E. 2d 403 (1948). See also, Matter of Dinsmore, 36 N.C. App. 720, 245 S.E. 2d 386 (1978). Here, the record discloses that Mrs. Moore was unable, on numerous occasions, to comply with suggestions for improving the family situation due to the resistance of Mr. Moore.

Indeed, a reading of this record compels the conclusion that most of the problems in this family during these children's early years resulted from Mr. Moore's heavy drinking, his hostile and abusive actions directed at Mrs. Moore and the children, and the resulting intimidation suffered by Mrs. Moore. I glean from the record that Mrs. Moore was generally responsive to the DSS recommendations but was prevented from pursuing many of them due to Mr. Moore's hostile behavior toward the DSS workers. The majority opinion acknowledges that on one occasion Mrs. Moore telephoned the DSS indicating that she was living in the mountains, expected to get a divorce soon and wanted to see her children, but had no way of getting to Greensboro. The record is abundantly clear that Mrs. Moore was poor and illiterate and, in my view, simply unable to comply with various DSS recommendations. From such evidence, I am unable to find the "willfulness" required by the statute. Surely such evidence does not disclose "a stubborn resistance" or the ability to do all that she was expected to do.

In summary, I do not believe that Mrs. Moore acted "willfully" in leaving her children in foster care as contemplated by the statute and, even if she did, I do not believe that there is clear, cogent and convincing evidence in the record to support the trial court conclusion that she had made no substantial progress in correcting the conditions leading to the removal of the children during the two-year period prior to the hearing.

C.

The third ground relied on by the trial court for terminating Mrs. Moore's parental rights was that the children had been placed

in the custody of DSS and that she had failed for a period of six months to pay a reasonable portion of the cost of their care. G.S. 7A-289.32(4) (1981). The majority's conclusion that this ground was proven by clear, cogent and convincing evidence and that there was no evidence to the contrary is clearly erroneous. As the majority notes in its statement of facts, Mrs. Moore testified at the termination hearing that she could not afford to pay anything for the children's support.

Moreover, I think that the majority opinion completely ignores the specific language of G.S. 7A-289.32(4) (1981) and this Court's recent decision in In re Clark, 303 N.C. 592, 281 S.E. 2d 47 (1981). The statute specifically provides that, as a ground for terminating parental rights, the child must have been placed in the custody of a child caring agency and the parent, "for a continuous period of six months next preceding the filing of the petition, has failed to pay a reasonable portion of the cost of care for the child." About this statute, this Court recently stated in Clark:

> A parent's ability to pay is the controlling characteristic of what is a "reasonable portion" of cost of foster care for the child which the parent must pay. A parent is required to pay that portion of the cost of foster care for the child that is fair, just and equitable based upon the parent's ability or means to pay. What is within a parent's "ability" to pay or what is within the "means" of a parent to pay is a difficult standard which requires great flexibility in its application. G.S. 7A-289.32(4) requires a parent to pay a reasonable portion of the child's foster care cost. The requirement applies irrespective of a parent's wealth or poverty. . . . The burden of DSS on the merits of the petition is a heavy one. The statute requires that all findings of fact be based on clear, cogent and convincing evidence. G.S. 7A-289.30(e).

303 N.C. at 604, 281 S.E. 2d at 55 (emphasis added).

Here, I find no clear, cogent and convincing evidence concerning this mother's ability to pay during the six months immediately preceding the filing of the petition. There are no findings concerning her ability to pay in order to determine what is a "reasonable portion" of the cost of foster care. Moreover, I find nothing in the record to indicate that the DSS ever asked Mrs. Moore for support prior to filing the papers for termination, nor was there ever any agreement for her to pay. In my view, the DSS did not carry the heavy burden required by this Court's decision in Clark. Indeed, I find little in the record to support any conclusion that this mother could afford to pay any portion of the children's foster care.

II.

I must also disagree with the majority's closing conclusion that the trial court's decision was in the best interest of the children. From the record before us, I see absolutely nothing to be gained on behalf of these children by terminating their mother's parental rights. I find nothing in this record to indicate that the DSS had taken any steps to find adoptive parents for these children. Indeed, nothing appears to indicate that Connie and Donnie, now fourteen years of age and obviously still suffering from some emotional problems, are adoptable. I doubt that they are adoptable and suspect they will remain in foster care until they attain majority, regardless of the disposition of this case.

On oral argument, I asked counsel for the DSS why, in light of my belief that the children were probably not adoptable, did the DSS initiate these proceedings. I quote the pertinent parts

of her reply:

> Because, starting three years ago . . . Guilford County began a concentrated effort to review the status of every child in foster care regardless of age, and we did begin with the younger children, with the objective in mind that we would take every effort possible to place children for adoption regardless of their age. Guilford County, through its Social Services Board, has expended great funds to contract with agencies, particularly one in . . . Minnesota, who specialize in hard to place children. We believe that every child who is in our care regardless of age has a responsibility from us to get every reasonable effort to get that child adopted. And we have had success in placing hard to place children and old children and minority children. . . . The specific answer to your question is that the administrators at the DSS and the appointed board have decided that we we will make concentrated effort to make sure that children do not grow up in foster care and do not fall through the administrative cracks in the foster care process.

Counsel then went on to explain that no steps toward determining adoptability are taken until parental rights have been terminated. She also noted that the county had experienced situations in which adoptive parents of older children allowed visitation from natural parents. She then noted that the county was still "experimenting" with different approaches.

I commend Guilford County for attempting new approaches to a most difficult problem and for taking steps to ensure that foster children do not fall through the "administrative cracks." Counsel was most articulate in presenting the county's case. The county's approach may well be the wisest in most cases, particularly those which are uncontested.

I cannot agree, however, that this approach comports either with our statute or [illegible] a contested case involving older children such as this. When a parent of an older

child resists the termination efforts, as here, I believe the county has the burden to show that the child is adoptable before termination should be allowed. G.S. 7A-289.22(2) expressly requires a recognition of "the need to protect all children from the unnecessary severance of a relationship with biological parents." (Emphasis added.)

The strong ties resulting from the biological relationship of parent and child has been traditionally recognized by the courts. The United States Supreme Court has spoken on this issue more than once. The rights to conceive and raise one's children have been deemed "essential," Meyer v. Nebraska, 262 U.S. 390, 399, 43 S. Ct. 625, 626, 67 L. Ed. 1042 (1923), "basic civil rights of man," Skinner v. Oklahoma, 316 U.S. 535, 541, 62 S. Ct. 1110, 1113, 86 L. Ed. 1655 (1942), and "[r]ights far more precious . . . than property rights," May v. Anderson, 345 U.S. 528, 533, 73 S. Ct. 840, 843, 97 L. Ed. 1221 (1953).

"It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the State can neither supply nor hinder." Prince v. Massachusetts, 321 U.S. 158, 166, 64 S. Ct. 438, 442, 88 L. Ed. 645 (1944). Moreover, the integrity of the family unit has found protection in the due process clause of the fourteenth amendment, the equal protection clause of the fourteenth amendment, and the ninth amendment. Stanley v. Illinois, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972). No greater emotional attachment exists than that resulting from the biological relationship of parent and child. See Smith v. Organ. of Foster Families for E. & Reform, 431 U.S. 816, 97 S. Ct. 2094, 53 L. Ed.

2d 14 (1977).

To conclude, as has the majority, that a child's best interests will be served by termination of parental rights is not only unsupportable from a record which discloses no better potential situation for the child than now exists, such a conclusion completely ignores the vital familial interests at stake for both parent and child. When the county prevails in termination of parental rights, it does not merely infringe on a fundamental liberty, it ends it forever. "Few forms of State action are both so severe and so irreversible." Santosky v. Kramer, ____ U.S.____ , 102 S. Ct. 1388, ____ L. Ed. 2d ____(1982). When the serious results of such proceedings are properly viewed, I believe that this Court should insist on the most strict interpretation of our statutes.

As the United States Supreme Court recently stated in Santosky:

> The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.

____ U.S. at ___ , ___ S. Ct. at 1394, ___ L. Ed. 2d at_____.

Here, I do not believe that the majority has recognized the "critical need for procedural protections" to protect this family, nor has it provided this parent with "fundamentally fair procedures." I have explained above my belief that the three statutory grounds were improperly utilized by the trial court and my belief that a findin;

of adoptability of children of this age is essential prior to termination of parental rights. We must remember that the purpose of these proceedings is not to punish the parent; it is to protect the children's best interests. Given the record before us, I see no protection for the children by terminating the parental rights of this mother. I do see, however, the most serious form of punishment to this mother.

From this record, this Court can only assume that Connie and Donnie will continue to reside in foster homes even if the trial court's order is allowed to stand. While I agree that Mrs. Moore is not yet ready to assume physical custody of her children, all parties (society as well) will be better served if the county attempts to help Mrs. Moore strengthen her ability as a parent.

III.

Finally, I wish to make it clear that I agree with the implementation of legislation that allows, in appropriate cases and with adequate procedural safeguards, termination of parental rights. By this dissent, I do not attack the legitimacy of the ends sought; rather, I would treat more seriously the means used to achieve those ends than does the majority. On the facts disclosed by this record, I do not believe the ends sought justify the means employed.

I vote to reverse.

Justice Elam joins in this dissenting opinion.

Justice Mitchell concurring.

I share Justice Carlton's view that, when neglect is to be used as a statutory ground for terminating parental rights, a finding of neglect must be based on conduct reasonably close in time to the filing of the petition to terminate. I disagree with the majority view on this point only.

I concur in the opinion of the majority as it relates to the two remaining statutory grounds for termination of parental rights relied upon by the trial court. As either of these two grounds is adequate standing alone to support the judgment of the trial court, I also concur in the result reached by the majority.

Justice Meyer joins in the concurring opinion.

notice of appeal within ten days of the entry of an order in a civil action or special proceeding. Although Rule 27(c) allows courts to extend the time limits provided in the North Carolina Rules of Appellate Procedure "for good cause shown," courts may not change the time limits for taking an appeal. Giannitrapani v. Duke University, 30 N.C. App. 667, 228 S.E.2d 46 (1976).

"The provisions of G. S. § 1-279 are jurisdictional, and unless they are complied with the appellate court acquires no jurisdiction of an appeal and must dismiss it." O'Neill v. Bank, 40 N.C. App. 227,230, 252 S.E.2d 231,233 (1979).

Respondent's appeal is therefore dismissed for failure to comply with the above-stated rules.

Appeal dismissed.

Judges HEDRICK and WHICHARD concur.

Report according to Rule 30(e).

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NO. 8118DC72

NORTH CAROLINA COURT OF APPEALS

Filed: 15 September 1981

IN THE MATTER OF

CONNIE MARIE MOORE and

DONNIE LEE MOORE,
Minors

Guilford County
73 J 1072
73 J 1073

Appeal by respondent Lillie Ruth Moore from Yeattes, Judge. Order entered 25 September 1980 in the Juvenile Division of District Court, Guilford County. Heard in the Court of Appeals 1 September 1981.

Margaret A. Dudley for petitioner-appellee.

Judith G. Behar for respondent-appellant.

HILL, Judge.

The parental rights of respondent were terminated pursuant to G. S. 7A-289.22 to .34 by order of the hearing judge entered on 25 September 1980. Notice of appeal was filed and served on 8 October 1980. Respondent filed and served an amended notice of appeal on 9 October 1980. Respondent's notice of appeal therefore first was filed and served thirteen days after entry of the order on 25 September.

G. S. 1-279(c) and Rule 3(c) of the North Carolina Rules of Appellate Procedure require the filing and service of a

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GUILFORD CO., C.S.C.

NORTH CAROLINA

GUILFORD COUNTY

IN THE GENERAL COURT OF JUSTICE

DISTRICT COURT DIVISION

IN THE MATTER OF

Donnie Lee Moore
and
Connie Marie Moore

ORDER

73 J 1072
73 J 1073

THIS MATTER, coming on for hearing and being heard before his Honor John F. Yeattes, Jr., Judge Presiding over the District Court of Guilford County on September 24th and 25th of 1980.

Present in Court for the hearing are Mrs. Lillie Ruth Pennington Moore represented by Attorney Judith Behar; Mrs. La Bonnie Smith, Mental Health Nurse with the Guilford County Mental Health Center; Mrs. Joyce Vaughn, Mr. Richard Gainer, and Mrs. Mary Jo Elmore of the Guilford County Department of Social Services; Attorney M. Douglas Berry, Guardian ad Litem for the children, and Miss Margaret A. Dudley, Assistant County Attorney representing the petitioner. The Court found that it would have jurisdiction to make a child custody determination under N. C. G. S. 50A-3.

Upon inquiring into the matter the Court finds that a petition filed on January 21, 1980, requested the termination of parental rights of the parents of Donnie Lee and Connie Marie Moore; the parents of these children are Lilly Ruth Pennington Moore and Bruce Kelly Moore. The mother was served with notice of these proceedings on February 5, 1980. The father released them for adoption on February 7, 1980. An answer was filed on behalf of the mother on February 28, 1980. An order was granted on March 14, 1980, allowing Mrs. Judith Behar, Counsel for Mrs. Moore to inspect the records regarding this family that are on file at the Guilford County Department of Social Services.

A pretrial conference was held pursuant to N. C. G. S. 7A289.29 on July 15, 1980, and an order was entered on said date setting forth the issues to be tried at the hearing on the merits. Pursuant to said order, Counsel for the Respondent, Mrs. Behar, was given ten (10) days to amend her answer to challenge the constitutionality of G. S. 7A-289.32 which "deems that if the Court has found a child or children to be neglected within the meaning of N. C. G. S. 7A-278(4), that they are neglected within N. C. G. S. 7A-289.32." Mrs. Behar filed an amended answer on July 24, 1980.

Upon the calling of the matter for trial on September 24, 1930, Counsel for the Petitioner, Ms. Dudley, moved that the respondent's motion for jury trial and motion to dismiss pursuant to Rule 12(b)(6) be heard. Counsel for Respondent, Mrs. Behar, asked that a hearing on the motions be delayed until a further time. The Court heard arguments on the motions and ruled that the Rule 12(b)(6) motion be dismissed in that the petitioner had stated a claim upon which relief could be granted. The Court also ruled that counsel for respondent had not demanded a jury trial in any of the previous pleadings filed on the respondent's behalf even though the initial petition had been filed January 21, 1980, and further that the respondent had filed an answer and an amended answer wherein no demand for a jury trial had been made. The first demand for a jury trial was made at 9:18 a.m. on the day of the trial, September 24, 1980. Accordingly, the Court ruled that the respondent had waived her right to a jury trial, if any. In addition, N. C. G. S. 7A-289.32(30)(a) specifies that "the hearing on the termination of parental rights shall be conducted by the District Court sitting without a jury."

Based on the believable evidence, the Court makes the following findings of fact:

Mrs. Joyce Vaughn, testifying from the Department of Social Services' records, which were admitted into evidence, stated that she was previously the supervisor of the Aid To Families With Dependent Children intake service unit and supervised two workers involved in this case from August 9, 1973, until April 1, 1975, and had personal contact with the family on occasion. There were weekly conferences regarding the case as well as daily contact between supervisor and workers. In November of 1973 Mrs. Moore asked if her children, Donnie and Connie, could be placed in foster care while she entered the hospital. The Guilford County Department of Social Services offered to assist the family with housing and did locate a place for the family within the city limits. On December 2, 1973, the mother signed a dependency petition and Donnie and Connie were placed in foster care. The mother was in the psychiatric unit of L. Richardson Hospital and stayed there for three weeks. There were a lot of visits from representatives of Guilford County Department of Social Services while the mother was in the hospital and she said that she would leave Mr. Moore. Mrs. Moore expressed a desire to live separately from her husband, but stated that she had no income so the caseworker assisted her in applying for Supplemental Security Income. The Guilford County Department of Social Services assisted Mrs. Moore with housing and emergency financial assistance until her Supplemental Security Income benefits began. After a six week separation, Mrs.

Moore decided to again live with her husband and stated to representatives of the Guilford County Department of Social Services that she and Mr. Moore got along o.k. when he wasn't drinking. During January of 1974, the caseworker talked with Mr. and Mr. Moore about stabilizing their family situation, securing separate housing, and maintaining a stable family situation for a period of several months. The caseworker also counseled with the Moores regarding family stability and their parenting skills. In that Mrs. Moore could not read or write, the suggestion was made by the Department of Social Services that she attend the Guilford Technical Institute or arrange for a tutor. Mrs. Moore was referred to the Vocational Rehabilitation Office, but did not follow through with going to said office. The Guilford County Department of Social Services made a service plan for this family from February, 1974 through June of 1974; it encompassed a plan to work on the following things: 1) family disorganization; 2) efforts to rectify the conditions that led to complaints of negligence and abuse; 3) lack of parental guidance for the children; 4) lack of parental support. The parents did little in the way of alleviating these conditions and failed to keep many of the scheduled appointments.

At this time Connie was experiencing behavior problems; she was very disruptive, was acting out sexual intercourse, and complained that her vagina was hurting. The complaints about Connie's behavior continued from September through November of 1974. The representative of the Guilford County Department of Social Services was in close contact with the school and took the children and their mother to the Health Department. On February 21, 1974, custody of Donnie and Connie Moore was returned to Mr. and Mrs. Moore. The children stayed with their parents until November of 1974. The Guilford County Department of Social Services continued to work with the family. The department made day care arrangements for the children. The department requested that Mr. Moore continue treatment at CARES and that Mrs. Moore continue her sessions at the Mental Health Center. Connie was found to have a vaginal disorder when she was in the first grade. Her mother admitted to doing nothing about Connie's complaints of vaginal discomfort. On November 15, 1974, Connie's teacher notified the Guilford County Department of Social Services that she had sent several notes to Connie's parents and that the school had also sent a registered letter to them. The principal of the school went to the Moore home and took Mr. and Mrs. Moore to the school for a conference. The Guilford County Department of Social Services told Mrs. Moore that it was her responsibility to see about

the children's welfare and to follow up on their medical complaints. Mrs. Vaughn testified that as a social worker complaints of vaginal distress amoung young girls between the ages of four and seven are rare. A letter was sent to the parents by the Department of Social Services reminding them of medical treatment for Donnie and offering transportation. There was no follow through by the parents, and the appointment for Donnie's psychological examination was not kept. When Mr. Moore wasn't present, Mrs. Moore would acknowledge that the family had problems, and she would say what she wanted to do about them, however, she never did anything.

On December 13, 1974, the Guilford County Department of Social Services was given legal custody of both Connie and Donnie Moore after they were adjudicated neglected; Connie was placed in foster care, and Donnie's physical custody remained with his parents.

Richard Gainer, a Social Worker at the Guilford County Department of Social Services' Family and Children's unit since 1973 became the social worker for the Moore family when the case was transferred pursuant to a court order of March 11, 1975, after the Moores told the court that they were having difficulty with a female worker and requested a male worker. Upon Mr. Gainer's first visit on April 2, 1975, the Moores were facing eviction. The husband and wife were hostile with each other, but Mrs. Moore seemed more willing to cooperate. Five days after April 2, 1975, Mrs. Moore called the Guilford County Department of Social Services and stated that there was no food in the house and the family was in danger of eviction. Since April 1, 1975, the Moores have had the following residences:

1. Troxler Trailer Park

2. 127 Summit Avenue
   Greensboro, NC — 5/29/75

3. Mrs. Moore went to Philadelphia, PA — 6/12/75

4. Mr. and Mrs. Moore living with sister-in-law
   at 307 Blandwood Avenue — 7/16/75

5. Mrs. Moore living with in-laws
   504 Edgeworth Street — 9/75

6. Mr. & Mrs. Moore
   1102 Willard Street
   Greensboro, NC — 10/10/75

7. Mrs. Moore called the Guilford County Department
   of Social Services from Lansing, N. C. and
   stated that she had left Mr. Moore — 5/19/76

8. Mr. & Mrs. Moore
   Green's Trailer Court
   Hilltop Road — 7/26/76

9. Mrs. Moore
   Spoon's Motel
   Greensboro, N. C. 10/76

10. Mr. & Mrs. Moore
    Groometown Trailer Park
    Lot #13 5/17/77

11. Mr. & Mrs. Moore in Lansing, N. C.
    living with relatives 7/12/77

12. Mr. & Mrs. Moore living with a friend
    in Summerfield, N. C. 8/3/77

13. Mr. & Mrs. Moore in Smithport, N. C. 10/11/77

14. Mrs. Moore in Lansing, N. C. 5/29/79

15. Mrs. Moore
    818 Gregory Street
    Greensboro, N. C. 2/12/80

16. Mrs. Moore
    Route 2, Box 435A
    Gibsonville, NC

The Guilford County Department of Social Services offered the following services to the Moores; on April 28, 1975, the department gave Mrs. Moore One Hundred Dollars ($100) out of County Financial Assistance Funds to aid her in paying rent. On May 29, 1975, the Guilford County Department of Social Services paid Sixty-One Dollars ($61) for an apartment for Mrs. Moore located at 127 Summit Avenue. On July 16, 1975, Mr. & Mrs. Moore were given Fifty Dollars ($50) by the Guilford County Department of Social Services for rent and they were referred to the Urban Ministry who gave them Fifteen Dollars ($15) for electricity. On May 29, 1975, the Moores were referred to the Social Security Office and urged to apply for SSI benefits. On January 20, 1976, the Moores were given $22.83 from County Financial Assistance funds to pay for heating oil. On February 12, 1976, the Guilford County Department of Social Services certified Mrs. Moore for free medication from the Guilford County Mental Health Center. On August 3, 1977, the Moores were referred to the Supportive Services Unit of the Department as well as on August 9, 1977.

Mrs. Moore has had the following visiting schedule in reference to these children since they have been in foster care:

1. 12/31/74 Donnie and Connie
2. 8/5/75 Donnie and Connie
3. 10/3/75 Donnie and Connie
4. 11/10/75 Donnie and Connie
5. 7/28/76 Donnie and Connie
6. 7/26/79 Connie
7. 7/31/79 Donnie
8. 3/31/80 Donnie and Connie
9. 6/3/80 Donnie and Connie
10. 6/17/80 Connie
11. 6/24/80 Donnie
12. 7/25/80 Connie
13. 9/11/80 Connie

Mr. Gainer reiterated to the Moores that the Guilford County Department of Social Services wanted Mr. Moore to stop his excessive drinking, wanted a curtailment of Mr. Moore's infractions with the law, and the department wanted to be assured that Mr. and Mrs. Moore were getting along. The department wanted the Moores to maintain a stable household and provide for themselves for four or five months before it considered returning the children. The Moores never made a single request on behalf of their children other than for visitation and that they wanted them home. There would be periods of time wherein Mr. Gainer received no contact from the parents. On May 29, 1979, Mr. Gainer heard from Mrs. Moore who called from Lansing, N. C. to see how the children were. She asked about the children and wanted to see them but had no way to get to Greensboro. Mrs. Moore has never paid any support for these children since they have been in the custody of the Guilford County Department of Social Services. On July 2, 1980, Mrs. Moore asked Mr. Gainer what amount she should contribute for support. Mrs. Moore agreed to pay $40 per week but has not paid anything to date. Until July of 1980, Mrs. Moore had not sent any Christmas, Easter, or Birthday presents for these children during their entire stay in foster care. Donnie received a CB radio and Connie received a clock-radio. Both children received birthday cakes.

Connie Moore was hospitalized at N. C. Memorial Hospital from February, 1977 until June, 1977 and at Thompson's Children's Home in Charlotte from June 27, 1977, to May 2, 1980. A rate of $142.50 is paid monthly for each of these children. Connie's stay at Thompson's cost $28,883.96. The children also receive medicaid and a clothing allowance.

Since Mr. Gainer has been the worker, Mrs. Moore has lived independently

1. Troxler Trailer Park - 4/2/75 to 5/29/75 2
2. 127 Summit Ave., Greensboro - stayed two weeks
3. Green's Trailer Court, Hilltop Rd., Greensboro, NC
4. Spoon's Motel
5. Route 2, Box 435A, Gibsonville, NC - since 8/80

In Mr. Gainer's efforts to enhance and improve the Moores' relationship to their children he talked with the parents many times about their marital relationship and counseled with Mr. Moore about his drinking problem. Mr. Gainer's main concern was for the family stability, and his basic approach was to settle the family problems then he would see about the relationship with the children. Mr. Gainer also took affirmative steps to keep Mrs. Moore informed of the children's progress and how their health was. Mr. Gainer also observed the children after visits with their mother; they would toss and turn at night according to the foster parents and still have questions about unkept promises.

Many children have behavioral problems adjusting, but not to the extent that these children experienced. Their ability to adjust would be much more pronounced for three or four days after visiting. Visits were not encouraged in the beginning of 1975 when Mr. Gainer became the social worker because of the marked instability of the family. Donnie has been in six foster homes since 1975. He was removed from his most recent placement, which had been a long term placement, because the foster parents began to have marital problems and requested his move. He was moved to his present foster home on July 24, 1979. Mrs. Moore didn't see or communicate with Donnie in 1978 and 1979. Connie has been in seven foster homes, N. C. Memorial, and Thompson Children's Home. She has multiple behavioral problems.

On December 8, 1975, Mr. Gainer stated to the Moores that before the children could be returned, certain conditions were to be met and Mrs. Moore felt that the conditions were reasonable. Mrs. Moore never made commitments other than visits that she would sometimes miss. Mrs. Moore told Mr. Gainer what she would do or changes she would make but did not make them. Mrs. Moore would leave Mr. Moore on occasion but would reunite with him. Connie has a warm feeling and is jubilant to see her mother, but Donnie has a docile reaction and isn't too emotional.

Mr. Gainer also testified that Connie's behavior has stabilized since her stay at Thompson's and that it is much more controlled. It takes a lot of time and effort to deal with Connie; she is in special education and her adjustment is slow. She can hardly read and has an I.Q. of 59 as of March 29, 1980.

Donnie has had counseling sessions with Dr. A. J. Courts, a psychiatrist, since he began acting out and being defiant. His behavior has improved considerable since March 31, 1980. Mr. Gainer also testified that he did not feel comfortable taking the children to the Moore home. There was no follow through by Mrs. Moore with any of the promises made to the children. Donnie does not want to return to his mother; his school performance has improved in his current foster placement. He has been moved from a MR class to a regular classroom. His work is much more stabilized and much more acceptable. Donnie has also stated that he does not want to visit his mother.

Mrs. Mary Jo Elmore has had four contacts with Mrs. Moore, and Mrs. Moore has stated that she is now in a position to take care of the children and was going to move in with her brother who would take the children. Mrs. Moore stated to Mrs. Elmore that she wondered if her brother would take a child with discipline problems like Connie and stated "I don't know if I can handle

it." Mrs. Moore did not respond when Mrs. Elmore asked why she had not called the children at Christmas even though she had called her other children.

By stipulation, Dr. Michael Ende, Staff Psychiatrist of the Guilford County Mental Health Center reported to the Court in part that:

> "Mrs. Moore's apparent coping skills in the past have been quite limited. She has been markedly emotionally dependent, unable to remove herself from situations that were destructive to herself and her children. She has defended herself via regressive behaviors, some periods of alcohol dependence and the use of much denial and projection in dealing with her own difficulties in life. Despite all of the above, she still today has not made any move on her own to become a more self-sufficient, responsible person. At the level Ms. Moore is at now, I would imagine she would have very much difficulty in setting limits for and solving problems for two young adolescent children. On the other hand, she seems to be quite motivated at this time to become somewhat more self-sufficient in order to be able to regain custody of her children. There seems to be little doubt that Ms. Moore cares for her children and I have no history available to me that would indicate that she has ever been abusive to them other than extremely neglectful in allowing these situations to persist."

Mrs. Moore was divorced from Bruce Kelly Moore on October 8, 1979, and was separated two years before the divorce. She also testified that she owns a 1971 Cadillac and receives $218 in Social Security benefits; that her car insurance is $800 per year and she has no car payments. She stated that she did not pay the $40 per week child support because she had to pay her car insurance. She stated that she did not visit while living in Ashe County because she had no transportation and didn't call because the people up there won't let you call long distance. She stated that she loves the children and thinks she knows how to care for them. As to the statement to Mrs. Elmore, regarding whether she could handle Connie, she was shocked and didn't know what she was saying at the time. In the last few months she has learned that the children should have groceries, and a decent place to live. She stated that she could can food for the winter and have a hog, and that she was going to GTI to learn how to help and what she couldn't help with she could hire someone to do. She also stated that the only job that she could do would be a maid or dishwasher. Mrs. Moore would like to work in a factory but has no job experience. At Guilford Technical Institute she could learn to read, write, and count money. Since her children have been in the care of the Guilford County Department of Social Services, Mrs. Moore has undertaken no efforts to get the case reviewed in Court because she had no transportation. Mrs. Moore receives Two Hundred and Eighteen ($218) Dollars monthly Social Security benefits; her rent is One Hundred and Twenty-Five ($125) Dollars per month; her insurance payment was Seventy-Seven Dollars and Eighty Cents ($77.80); she owns two cars and a pickup truck that she rents; she has had this transportation since she came

to Greensboro; even though she has had these two cars and a truck in the last seven months, she couldn't pay support. Mrs. Moore saved her money to buy the cars, but the truck was given to her and she has not paid one penny of child support. Mrs. Moore volunteered to pay the support until she got her insurance bill. Mrs. Moore has other income from lending her car out at the rate of Fifty Dollars ($50) per week, and her total income is not Two Hundred and Eighteen ($218) Dollars per month. Mrs. Moore does not know the name of the school in her community that the children would attend if returned to her. She didn't know the grade level of the schools. She stated that the children would go to Gibsonville School and that she talked with Libby about schools, but she didn't talk with the people who run the school. Mrs. Moore also stated that from what she understood the children would have to be in a special class and that she wasn't sure if schools in her area offered special classes.

In Mrs. Moore's efforts to find a job, she called the Holiday Inn once about three weeks ago; she inquired at a motel in Randleman about a part-time job and they said that no extra help was needed until a convention was booked. Mrs. Moore made three efforts to look for a job since the petition was filed. Mrs. Moore dropped out of the program at the Guilford Technical Institute because she couldn't get to school because of gas problems.

The Guilford County Department of Social Services helped Mrs. Moore with housing, food, medicine, County Financial Assitance, rent, heat, and a Mental Health Referral. She stated that the Department of Social Services discouraged her in reference to the kids, but not in reference to the other listed services. Mrs. Moore took the matter to court one time and was turned down so she went back to the mountains. Mrs. Moore has two grown daughters in Pennsylvania and gave birth to a son who has been adopted. She also stated that there was nothing that she could do as long as Bruce was around. The Court also finds that Mrs. Moore feels that a good parent makes the kids mind, gives them a good education, provides a decent and clean home and nice things to live with, and groceries. She stated that she had tried in the past, and had been a good mother in the last five years even though she did not visit the children for three years during the time that they have been in foster care because she was stranded and it couldn't be helped.

Mrs. Moore called the Guilford County Department of Social Services collect in the past and the department accepted the charges, and she has

never been told by any representative of the Guilford County Department of Social Services that she could not call collect. According to Mrs. Moore, even though the children have been out of the home for five years she has been a good mother even though there was a three year period when she didn't see the children. She testified that she was thinking about the children. Mrs. Moore couldn't get to a phone to make calls because people don't want long distance calls made. She stated that even though she could call the Guilford County Department of Social Services collect, she never tried but once because she couldn't call and talk directly to Connie and Donnie.

Mrs. Moore also contacted a sewing place at Gibsonville about employment. She also stated that she didn't want to take any full time job like a maid because of the customers drinking. Mrs. Moore wouldn't have turned down a full time job in the kitchen but would have turned down a job as a maid. LaBonnie Smith, a psychiatric nurse who has been Mrs. Moore's treating therapist, testified that since Mrs. Moore returned to Guilford County Mental Health on April 1, 1980, her attendance has been regular on a monthly basis. She has followed through on treatment recommendations that she continue on medication, keep her appointments, ventilate about stressful situations, and inquire about financial assistance. She is now living independently, keeps her appointments at Mental Health, and is responding well to medication.

Upon the foregoing findings of fact, the Court concludes as a matter of law that:

1. Mrs. Lilly Ruth Pennington Moore has wilfully left these children in foster care for more than two years.

2. Mrs. Lilly Ruth Pennington Moore has neglected Donnie Lee and Connie Marie Moore within the meaning of the law.

3. Substantial progress has not been made to the satisfaction of the Court in correcting the conditions which led to the removal of these children for neglect.

4. The Guilford County Department of Social Services diligently encouraged Mrs. Moore to strengthen her parental relationship to these children and to make and follow through with constructive planning for the future of the children.

5. The children have been placed in the custody of the Director of the Department of Social Services of Guilford County for a continuous period of six months next preceding the filing of the petition.

6. Mrs. Lilly Ruth Pennington Moore has failed and refused to pay a reasonable portion of the cost of care for these children for a continuous period of six months next preceding the filing of the petition.

IT IS NOW, THEREFORE, ORDERED, ADJUDGED, AND DECREED that the parental rights of Lilly Ruth Pennington Moore be and the same are hereby terminated. Further, that the children are to remain in the custody of the Director of the Guilford County Department of Social Services until such time as they can be placed for adoption.

This the 25 day of November, 1980, nunc pro tunc September 25, 1980.

John F. Yeattes, Jr.
JUDGE PRESIDING

No. 82 - 5773

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

IN THE MATTER OF)
)
CONNIE MARIE MOORE and) MOTION TO DISMISS
)
DONNIE LEE MOORE,)
)
Minors.)

The Guilford County Department of Social Services respectfully requests that the Court dismiss this appeal on the ground that the appeal is not within this Court's jurisdiction and on the ground that the case does not present a substantial federal question.

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Counsel for the Guilford County
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Phone: (919) 373-3852

No. 82 - 5773

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

IN THE MATTER OF	)
	)
CONNIE MARIE MOORE AND	)
DONNIE LEE MOORE,	)
Minors.	)
	)
LILLIE RUTH MOORE,	)
Appellant,	)
	)
vs.	)
	)
GUILFORD COUNTY DEPARTMENT	)
OF SOCIAL SERVICES,	)
Appellee.	)

ON APPEAL FROM THE SUPREME COURT OF NORTH CAROLINA

RESPONSE OF THE APPELLEE, GUILFORD COUNTY DEPARTMENT OF SOCIAL SERVICES TO THE APPELLANT'S JURISDICTIONAL STATEMENT.

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I. THE TERMINATION OF THE APPELLANT'S PARENTAL RIGHTS PURSUANT TO NORTH CAROLINA GENERAL STATUTE 7A-289.32 DID NOT DENY HER DUE PROCESS OF LAW IN THAT SAID STATUTE IS NOT UNCONSTITUTIONALLY VAGUE AND THAT STATUTE'S REQUIREMENT THAT APPELLANT SHOW A SUBSTANTIAL CHANGE IN THE CONDITIONS THAT LED TO HER CHILDREN'S REMOVAL FOR NEGLECT WAS NOT AN IMPERMISSIBLE SHIFTING OF THE BURDEN OF PROOF.

II. THE TERMINATION OF APPELLANT'S PARENTAL RIGHTS IN THE ABSENCE OF THE ANNUAL JUDICIAL REVIEW MANDATED BY NORTH CAROLINA GENERAL STATUTE 7A-657 DID NOT VIOLATE THE APPELLANT'S RIGHT TO DUE PROCESS OF LAW.

TABLE OF AUTHORITIES

STATEMENT OF THE FACTS

Mrs. Lillie Ruth Pennington Moore, the appellant-respondent, is the mother of Connie Marie Moore and Donnie Lee Moore, born July 27, 1968. In December of 1973, Mrs. Moore signed a dependency petition and the Guilford County Department of Social Services placed the children in foster care on an emergency basis while Mrs. Moore entered L. Richardson hospital for psychiatric treatment. Mr. Moore had been arrested on an assault charge brought by his wife. During the period that Mrs. Moore was in the hospital and immediately thereafter, the Social Worker made a number of visits to see Mrs. Moore and counseled with her, trying to help her decide what she wanted to do. Mrs. Moore decided that she did not want to return to her husband and expressed a desire to live separately from him. The social worker assisted Mrs. Moore in applying for Supplemental Security Income, arranged for emergency financial assistance until the Supplemental Security Income beneifts could begin, and located an apartment for Mrs. Moore. The Moores reconciled in January, 1974 and the Court ordered the children returned to them. Both before and after the children came back, the social worker stressed the importance of the family's not living with relatives, of separate rooms for the children, and of continued family stability for several months. The social worker attempted to convey to the Moores that separate housing was insufficient for the Department of Social Services to recommend that custody of the children be given to them.

Throughout the time that the social workers were involved with Mr. and Mrs. Moore, there was counseling in terms of family stability, family organization, and parenting skills. Since Mrs. Moore could not read or write, and she felt that this was a detriment to her obtaining employment and perhaps separating from Mr. Moore, it was suggested to her that Guilford Technical Institute could offer adult basic education or that private tutoring could be arranged. Mrs. Moore was referred to the Vocational Rehabilitation Office for assistance in locating a job or furthering her education, but she never followed through on these referrals.

During the period from February through June of 1974, the department's service plan was to work on family disorganization, to try to rectify the

conditions that had resulted in numerous complaints of neglect and or abuse, lack of parental guidance for the children, and lack of parental support. The parents responded with very little follow through and had difficulty keeping appointments. At Mrs. Moore's request, a social worker arranged for the children to have their pre-school inoculations. On February 21, 1974, the custody of the children was returned to their parents.

When the children began school, there were reports that Connie was disruptive in class, used profane language, hit and spit other children, and acted out sexual intercourse. She also complained of vaginal pain. On November 15, 1974, the Department of Social Services was notified that the teacher or the school had sent several notes home asking that the parents come in to discuss the situation, with no response. A registered letter to the Moores had been sent from the school asking them to come in. The principal ultimately went out to the Moores home and took them to the school for a conference.

There was very little follow through on the medical needs of the children. The social worker talked with Mrs. Moore about Connie's sexually acting out and her complaints of vaginal pain. Mrs. Moore was told that it was her responsibility to see that the children were attended to and their medical needs met. On November 15, 1974, the social worker took Mrs. Moore and Connie to the clinic and Connie was found to have an inflamed vagina. A neglect petition was signed that day. The social worker urged Mr. Moore to get employment and counseling for his drinking problem and urged Mrs. Moore to go to Guilford Technical Institute to get more skills and to be more independent.

At the hearing in December, the parents were represented by counsel. Custody of the children was placed with the Department of Social Services with Donnie to remain in the home under the Department of Social Services' supervision. Although Donnie was reported as sleeping a lot when he began school, there were no reports of disruptive behavior by him or of specific instances of neglect.

When Mr. Moore evinced hostitlity to the social worker then on the case, another social worker, Richard Gainer, took over on April 1, 1975. Mr. Gainer familiarized himself with the Moores' record at the Department of Social Services prior to his first visit with the family, a few days before a scheduled court hearing concerning Donnie's custody. When Mr. Gainer

arrived for his first visit, he discovered that the Moores were facing eviction and Mr. Moore was in hiding because he expected to be arrested for failing to comply with a court order to pay a sum of money. Mr. Moore, according to Mr. Gainer, the social worker, was quite hostile and was drinking heavily around this time.

Since 1975, the Moores have had sixteen different addresses.

The Guilford County Department of Social Services offered the following services to the Moores: money for ent on a mobile home and an apartment, fuel oil, medication, and referrals to other human service agencies for help.

Mrs. Moore's visiting schedule with the children since they entered foster care has been as follows:

1. December 31, 1974
2. August 5, 1975
3. October 3, 1975
4. November 10, 1975
5. July 28, 1976
6. July 26, 1979 - Connie
   July 31, 1979 - visit for Donny scheduled
7. March 31, 1980
8. June 17, 1980 - Connie
9. June 24, 1980 - Donnie
10. July 25, 1980 - Connie
11. September 11, 1980 - Connie

There were no visits from July of 1976 until July of 1979. All of the 1980 visits were had after the petition to terminate parental rights was filed.

From December, 1974, to the time of the hearing, Connie had been in either seven or nine foster homes, in North Carolina Memorial Hospital for psychiatric treatment, and Thompson Children's Home. Between May, 1980, when she left Thompson's, and the termination hearing in September, she had been in two homes.

After the children were removed, Mr. and Mrs. Moore continued to have economic and marital difficulties. They moved frequently and applied to the Department of Social Services for help in finding housing and for money. In December, 1975, the Moores were in court on their Motion to get back their children.

On July 2, 1980, Mrs. Moore asked the social worker how much money she should pay for the children's support. The worker suggested fifteen dollars per week. Mrs. Moore suggested that she give forty dollars, however, she never paid any child support. Mrs. Moore had never given the children any gifts of any kind during their stay in foster care until 1980.

The Guilford County Department of Social Services paid Thompson's Children's Home $28,883.96 for Connie's care. The foster parents are paid $142.50 per month, and the children receive medicaid. The Department furnished their clothing. The social worker did keep Mrs. Moore informed of the children's progress in school, their health, and the children's concern about their parents.

During 1975, visits with the mother were not encouraged because she was very unstable. By 1979, the Department of Social Services had decided that adoption was in the children's best interest, but never refused the children the opportunity to visit with their parents.

Since Mrs. Moore's return to Guilford County in February of 1980, she has not applied for any social services benefits. Since that time efforts have not been focused on strengthening parental ties because proceedings to terminate parental rights had been instituted, however, there have been no efforts to negate or weaken the parental ties either.

Although much improved, Connie still has some behavior problems and is slow academically. She is in special education classes. On February 8, 1980, Mrs. Moore came to the Department of Social Services and said that she was now in a position to take care of the children. She was going to move in with a brother in Ashe County who had agreed to take both of the children. She was not divorced. She later wondered if the brother was willing to have children with discipline problems, and she stated that she did not know if she could handle Connie's problems.

Mrs. Moore stated that she had not been actively involved with the children but had no answer to the social worker's inquiry of why she had made no efforts to write. Mrs. Moore has two other children who live in Pennsylvania with whom she communicated at Christmas in 1979 but when asked why no effort was made to communicate with Connie and Donnie, she had no response.

Mrs. Moore was referred to the Mental Health Center by court order and has attended on a monthly basis since April 1, 1980. She stated that the only jobs that she could perform were maid and dishwasher although she would like to work in a factory but has no experience.

Before Mrs. Moore went to live in the mountains, the Department of Social Services helped her with 1) housing, 2) food, 3) medicine, 4) medical care, and 5) financial assistance yet she did not ask the Department of Social Services once to help her do anything about the children. A good parent,

according to Mrs. Moore, should make children mind, see that they get a good education, provide a decent clean home, and food. The Department of Social Services accepted collect calls from Mrs. Moore at anytime.

THE APPELLANT HAS NOT BEEN DENIED DUE PROCESS OF LAW BECAUSE NORTH CAROLINA GENERAL STATUTE 7A-289.32 IS NOT UNCONSTITUTIONALLY VAGUE.

On September 25, 1980, the appellants parental rights were terminated pursuant to North Carolina General Statute 7A-289.32(2), (3), (4). This decision was upheld by the North Carolina Supreme Court on July 13, 1982. The appellant contends that the decision of the trial court violated her due process rights. The initial question for consideration is what is due process? Applying the due process clause is an uncertain enterprise which must discover what fundamental fairness consists of in a particular situation by first considering an irrelevant precedent and then by assessing the several interests that are at stake. Due process has never been, and perhaps can never be precisely defined, but the essential element is fundamental fairness. The proceedings whereby Mrs. Moore's parental rights were terminated were fundamentally fair.

Due process has a dual significance as it pertains to procedure and substantive law. As to procedure it means notice and an opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case before a competent and impartial tribunal having jurisdiction of the case. State vs. Smith, 265 N. C. 173, 143 SE 2d. 293 (1965). In substantive law, due process may be characterized as a standard of reasonableness and as such it is a limitation upon the exercise of the police power. Undoubtedly, the state possesses the police power in its capacity as a sovereign, and in the exercise thereof, the legislature may enact laws, within constitutional limits, to protect or promote the health, morals, order, safety, and general welfare of society. If a statute is to be sustained as a legitimate exercise of the police power, it must have a rational, real, or substantial relation to the public health, morals, order, or safety, or the general welfare. State vs. Whitaker, 228 N. C. 352, 45 S. E. 2d 860 (1947), aff'd, 335 U. S. 525, 69 S. Ct. 251, 93 L. Ed.212 (1949) The right to family integrity is one of the most basic rights of our society, but it is not absolute, it must be considered against the important state interest of protecting minor children.

North Carolina's termination of parental rights statute has survived repeated constitutional challenges in the North Carolina appellate courts as well as before this honorable court. Lassiter vs. Department of Social Services of Durham County, 101 S. Ct. 2153 (1981).

The test for fatal vagueness was set forth in In Re Burrus, 275 N. C. 517, 169 S. E. 2d 879 (1969), aff'd. 403 U. S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971) as follows:

> A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law, Cramp vs. Board of Public Instruction, 368 U. S. 278, 7 L. Ed. 2d. 285; 82 S. Ct. 275. Even so impossible standards of statutory clarity are not required by the constitution. When the language of a statute provides an adequate warning as to the conduct it condemns and prescribes boundaries sufficiently distinct for judges and juries to interpret and administer it uniformly, constitutional requirements are fully met. United States vs. Petrillo, 332 U. S. 1, 91 L. Ed. 1877, 67 S. Ct. 1538. A statute must be examined in light of the circumstances in each case, and respondent has the burden of showing that the statute provides inadequate warning as to the conduct it governs or is incapable of uniform judicial administration. State vs. Covington, 34 N. C. App. 457, 238 S. E. 2d 794, review denied, 294 N. C. 184, 241 S. E. 2d 519 (1977).

As the North Carolina Court of Appeals stated in In Re Biggers, 274 S. E. 2d 236 (1981), G. S. 7A-289.32(2) provides that parental rights can be terminated if the child is neglected within the meaning of G. S. 7A-278(4). The applicable definition states that a

> "neglected child" is any child who does not receive proper care or supervision, or discipline from his parent, guardian, custodian or other person acting as a parent, or who has been abandoned, or who is not provided necessary medical care or other remedial care recognized under state law, or who lives in an environment injurious to his welfare, or who has been placed for care or adoption in violation of law G. S. 7A-278(4).
>
> Our Court has not found it difficult to give a precise meaning to this definition of a neglected child in particular cases by analyzing the factual circumstances before it and weighing the compelling interest of the State with those of the parents and child. In Re Cusson, 43 N. C. App. 333, 258 S. E. 2d. 858 (1979) Citations ommitted. Viewed in this light, G. S. 7A-289.32(2) is not vague because the terms used in G. S. 7A-278(4) are given a precise and understandable meaning by the

> normative standards imposed upon parents by our society, and parents are, therefore, given sufficient notice of the types of conduct that constitute child neglect in this state. In Re Biggers, 274 S. E. 2d 236 (1981).

Appellant states that the evidence of neglect in Biggers was clear cut and cites as examples the condition of the trailer, the respondent's drinking and drug usage, improper dress of the children and the lack of food. Respondent, the Guilford County Department of Social Services, contends that there are common evidentiary factors in Biggers and the case sub judice such as: both mothers asked the local Department of Social Services to care for their children; both mothers said that the father was the abusive parent; both mothers needed professional psychiatric or psychological help; both mothers had marital difficulties; both mothers had emotional problems; both mothers took inadquate care of their children; both mothers visited the children infrequently while they were in foster care, and both families necessitated the continued supervision of the Department of Social Services. In addition, when these children were adjudicated neglected on December 10, 1974, the Court found as a fact that the mother admitted that she was unable to control the children and make them mind and obey her, and that the parents were incapable of providing the care, training, and supervision to meet the needs of Connie.

Mrs. Moore was made aware of what was expected of her regarding her children. She was told numerous times by the social workers that she was expected to meet certain conditions. During January of 1974, the social worker talked with both Mr. and Mrs. Moore about the need to stablize their family situation, to secure separate housing, and to have not just separate housing but a stable family situation for a period of several months. By "separate housing," we meant an apartment, a house, a trailer, somewhere that was large enough for the children to have rooms and was maintained for the family unit; not living with another family or relative. Throughout the time that the workers were involved with Mr. and Mrs. Moore, there was counseling in terms of family stability, family organization, and parenting skills. Mrs. Moore was told specifically that it was her responsibility to make certain that the children received proper care and that Mr. Moore did not whip or

hurt them; she was also told that it was her responsibility to check on them if they were hurting. Letters were sent to remind the Moores of medical appointments for Donnie and offering transportation, however, the appointment was not kept. Specific self improvement suggestions were made to Mrs. Moore. In October of 1975, the social worker told Mrs. Moore the specific things that would be required of her before a recommendation could be made to the Court that the children be returned: these requirements were the ceasing of excessive drinking, the stopping of frequent infractions with the law; less marital discord, and the management of a stable household.

The weighing of the facts of this case by the tests of unconstitutionality clearly show that the allegations of unconstitutional vagueness as they relate to G. S. 7A-289.32(2) are totally without merit.

Pursuant to G. S. 7A-289.32(3), an order for termination of parental rights can be entered if the petitioner can show that the parents have

> [w]illfully left their children in foster care for more than two consecutive years and it has not been shown to the satisfaction of the Court that substantial progress has been made within two years in correcting the conditions that led to the children's removal for neglect or without showing positive response within two years to the diligent efforts of a county department of social services, a child-caring institution or licensed child placing agency to encourage the parent to strengthen the parental relationship to the child or to make and follow through with constructive planning for the future of the child.

The test is whether the language conveys a substantially definite warning of the prescribed conduct when measured by common understanding and practices. In Re Clark, 303 N. C. 603 (1981). The children were adjudicated neglected on December 10, 1974 and Connie was placed in foster care immediately. Donnie remained in the physical custody of his parents but was removed from them by Court order dated April 8, 1975. Both children have remained in foster care continuously since that time.

Appellant made one effort to get her children returned during their entire stay in foster care and that was in 1975. At the time that the children were adjudicated neglected the Court found that the mother could neither read nor write; that the mother admitted her inability to control the children; that the parents are incapable of providing the care, training, and supervision to meet the daughter's needs. Appellant would have this Court believe that she has made substantial progress in correcting the

conditions that led to the children's removal for neglect yet she stated that she didn't know if she could handle the behavior problems of the children. She was also unsure of her knowledge of how to take care of the childre. She at first stated that she was going to Guilford Technical Institute to learn to read and write which she had been encouraged to do by the social worker in 1974, but she dropped out. Mrs. Moore was still unfamiliar with the children's particular problems and had made no efforts to find out if their educational needs could be met in the area where she lives. She also has not lived alone for any significant period of time in her whole life. Mrs. Moore also stated that she was trying now to exhibit what in her opinion are the qualities of a good parent. She also stated that she knew that she had been a good mother to these children in the last five years, 1975-1980, although she did not see them from July of 1976 through July of 1979. Mrs. Moore was divorced from Bruce Kelly Moore on October 8, 1979, and had lived separate and apart from him for two years before the divorce yet made no attempt to get her children.

The word substantial means not imaginary or illusory, considerable in quanity. Webster's New Collogiate Dictionary (1973) It is not difficult for the Court to analyze the facts and weigh the interests of the parents and children in order to give a precise meaning to the terms of this statute.

G. S. 7A-289.32(4) requires that the Court has to find that the children have been placed in the custody of a county department of social services, a licensed child-placing agency, or a child-caring institution, and the parent, for a continuous period of six months next preceding the filing of the termiantion petition has failed to pay a reasonable portion of the cost of care of the children before an order can be entered upon this particular ground.

> This Court has already ruled in In Re Clark 303 N. C. 592, (1981) that the terms of G. S. 7A-289.32(4) are brief and plain in their meaning, and there can be no serious question as to the identification of the three types of institutions listed, the time element involved or the cost of providing foster care for the child. In addition, this Court has stated that a parent's ability to pay is the controlling characteristic of what is a 'reasonable portion' of cost of foster care for the child which the parent must pay. What is within a parent's ability to pay or what is within the 'means' of a parent to pay is a difficulty standard which requires great flexibility in its application. G. S. 7A-289.32(4) requires a parent to pay a reasonable portion of the child's foster care costs. The requirement applies irrespective of the parent's wealth or poverty.

By her own testimoney the mother has shown that she has had the ability to pay some support. She had rented her cousin's trailer in West Jefferson in Ashe County since 1976. She receives two hundred and eighteen dollars per month from Social Security. She could afford an $800.00 annual car insurance premium. She volunteered to pay child support in 1980. She had money to pay for long distance calls from West Jefferson. She paid one hundred and sixty dollars to get from West Jefferson to Winston-Salem for a ride and a cab. She owns two cars and a pick-up truck which she rents for $50.00 a week. She got these vehicles in the last eight months, and borrowed the money to purchase the car(s) which she has repaid.

As this Court stated in In Re Clark, supra, the provisions of G. S. 7A-289.32(4) are sufficiently definite to be applied in a uniform manner to protect both the State's substantial interest in the welfare of minor children and the parents' fundamental right to the integrity of their family unit.

> We find no constitutionally protected conduct here with regard to the respondent-mother's obligation to pay some portion of the foster care cost for her child. Could it reasonably be argued that failure for a continuous period of six months to pay a reasonable portion fo the cost of care for one's child which has been placed in the custody of the department of social services for foster care is a constitutionally protected right? Obviously not.

As stated by the N. C. Supreme Court:

> the phrase 'reasonable portion of the cost of care for the child' as used in the context of the Act is, by all normal standards, understandable by people of common intelligence without any necessity of guessing as to its meaning or differing as to its application. The phrase contains words of such common usage and understanding as to give parents notice of their responsibilities and of the type of conduct which is condemned, to-wit, failure to provide a reasonable portion of the cost of caring for the child. This phrase also provides boundaries sufficiently distinct that judges may interpret and administer it uniformly. While meeting these standards, it remains sufficiently flexible for application to the great variety of circumstances which will be presented to our courts tomorrow and tomorrow. In Re Clark supra.

In In Re Burrus supra and in In Re Biggers supra, the North Carolina Supreme Court has ruled that G. S. 7A-289.32(3) and (4) are not unconstitutionally vague.

THERE WAS NO IMPERMISSIBLE SHIFTING OF THE BURDEN OF PROOF FROM THE RESPONDENT TO THE APPELLANT.

North Carolina General Statute 7A-289.32(3) reads as follows:

> The parent has willfully left the child in foster care for more thatn two consecutive years without showing to the satisfaction of the court that substantial progress has been made within two years in correcting those conditions which led to the removal of the child for neglect, or without showing positive response within two years to the diligent efforts of a county department of social services, a child caring institution or licensed child placing agency to encourage the parent to strengthen the parental relationship to the child or to make and follow through with constructive planning for the future of the child.

The appellant contends that the statute's requirement that there be a showing by her of a substantial change in the conditions that led to the removal of the children for neglect was an impermissible shifting of the burden of proof. First of all, that element of subsection three of G. S. 7A-289.32 is just one of the things that has to be proved. There has to be clear, cogent, and convincing evidence that

> 1) the parent has willfully left the child in foster care for more than two consecutive years without showing that substantial progress has been made within two years in correcting the conditions which led to the removal for neglect
>
> OR (emphasis added)
>
> 2) without showing positive response within two years to the diligent efforts of a county department of social services to encourage the parent to strengthen the parental relationship to the child or (emphasis added) to make and follow through with constructive planning for the future of the child.

The respondent did not shift the burden of proof but clearly met it in its presentation of the evidence before the trial court.

> In the case at hand the trial court based its order terminating respondent's rights on three of the grounds set forth in the statute, (2), (3), and (4). The court concluded us a matter of law (a) that respondent had neglected the children; (b) that she had willfully left the children in foster care for more than two years and substantial progress had not been made to the court's satisfaction in correcting the conditions which lead to the removal of the children; and (c) the children had been placed in the custody of the Department of Social Services and respondent had failed for a period of six months to pay a reasonable portion of the costs of their care. Since respondent did not except to any of the findings they are presumed to be correct and supported by evidence. In the matter of Connie and Donnie Moore, N. C., 293 S. E. 2d. 127 (1982).

The burden of proof was not shifted. The burden on the parent after an adjudication of neglect is to do something to correct he neglectful conditions. This is not a shifting of the burden of proof. The burden on the parent is the burden of action to maintain and improve the parenting and thereby avoid the risk of loss of the child. The expectation of parents to properly care for their children is the burden placed on them by our society and is fundamental to one of our most important institutions, the family.

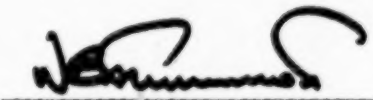
THERE WAS NO DENIAL OF DUE PROCESS BECAUSE THE JUDICIAL REVIEW MANDATED BY G. S. 7A-657 WAS NOT IN EFFECT WHILE THIS CASE WAS PENDING.

G. S. 7A-657 was passed by the 1979 North Carolina General Assembly and was effective January 1, 1980. These children were placed in the custody of the Guilford County Department of Social Services on December 13, 1974 after being adjudicated neglected. The termination of parental rights petition was filed January 21, 1980. There was no statutory requirement to review this case, therefore the appellant's due process rights, neither procedurally or substantively were violated.

CONCLUSION

For the aforestated reasons the Guilford County Department of Social Services contends that Mrs. Moore has suffered no deprivations of her constitutional rights, therefore this court has no jurisdiction to hear this case.

Respectfully submitted,



William B. Trevorrow
Guilford County Attorney

CERTIFICATE OF SERVICE

I, William B. Trevorrow, attorney for Appellee in the above-entitled action, do hereby certify that I have served a copy of the foregoing Motion to Dismiss and Response of the Appellee to the Appellant's Jurisdictional Statement on Judith G. Behar, attorney for appellant, M. D. Berry, guardian ad litem, and Rufus L. Edmisten, Attorney General of North Carolina, as follows:

Judith G. Behar
Attorney at Law
437 West Friendly Avenue
Greensboro, N. C. 27401

M. Douglas Berry
Southeastern Building
Greensboro, N. C.

By depositing a copy, first-class postage prepaid, in the United States mail addressed to:

Honorable Rufus L. Edmisten, Attorney General
P. O. Box 629
Raleigh, N. C. 27602

This the 21st day of December, 1982.

William B. Trevorrow